MONEY LAUNDERING COUNTER-MEASURES IN THE EUROPEAN UNION: A NEW PARADIGM OF SECURITY GOVERNANCE VERSUS FUNDAMENTAL LEGAL PRINCIPLES

Valsamis Mitsilegas

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The University of Edinburgh
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Herewith I wish to declare that:

a. the thesis has been composed by me; and that

b. the thesis is my own work.

Valsamis Mitsilegas

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ABSTRACT

The past decade witnessed the emergence in the European Union of a comprehensive legal framework aimed at countering money laundering. The aim of the thesis is to place these measures in context, by examining their evolution in the light of parallel developments in the fields of international relations and crime prevention and control. Through the employment of an interdisciplinary approach, it is demonstrated that the development of money laundering counter-measures in the European Union is inextricably linked with the reconceptualisation of security in the international arena, now extending beyond the narrow state/military realm and including threats such as organised crime and, related to that, money laundering. Money laundering counter-measures are thus legitimated as emergency measures deemed as necessary to address these newly perceived threats. In this context, and following international political pressure for the adoption of a global anti-money laundering framework, the European Union counter-measures constitute *a new paradigm of security governance*, achieved through three principal methods: *criminalisation*, consisting in the emergence of a new criminal offence of money laundering; *responsibilisation*, consisting in the mobilisation of the private sector to co-operate with the authorities in the fight against money laundering; and the emphasis on the *administration of knowledge*, through the establishment of new institutions, the financial intelligence units, with extensive powers to administer a wide range of information provided by the private sector. All three methods pose significant challenges to fundamental legal principles and ultimately, to well-established social transactions and bonds. The analysis will focus on these challenges, which become more acute in the light of the constant evolution of these measures. An attempt will thus be made to demonstrate that a 'securitised' anti-money laundering paradigm, which may serve as a mould for subsequent initiatives in the field of organised crime, has the potential to undermine the very essence of fundamental legal principles and rights. This is particularly the case in the European Union as the latter's ambitious position as an international security actor putting forward a security paradigm in the field of money laundering is not accompanied by analogous powers to protect fundamental

rights. In view of these dangers, a call will be made for the 'de-securitisation' of money laundering counter-measures, through attempts towards a realistic and well-founded estimation of the actual threat and the promotion of legal certainty and respect of fundamental legal principles in the drafting of new measures. At the same time, the imposition of security measures by the European Union must be accompanied by the constitutionalisation at the EU level of the protection of fundamental legal principles and human rights.

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INTRODUCTION

The past fifteen years have witnessed an unprecedented mobilisation in the international policy arena aimed at the adoption of measures to counter a phenomenon newly meriting attention: money laundering. International organisations such as the United Nations and the Council of Europe, supranational bodies such as the European Union, and *ad hoc* bodies established for that purpose, such as the Financial Action Task Force, produced a series of detailed binding and 'soft' legal rules in the field. Such world-wide mobilisation has led to the global application of money laundering counter-measures and to their constant evolution. At the same time, it has led to an intense academic interest which has produced a wide range of legal, criminological and economic analyses of the phenomenon and its counter-measures.

The aim of the thesis is to go beyond such analyses and place the evolution of money laundering counter-measures in context. Through the employment of an interdisciplinary approach, and on the basis, along with secondary literature, of a wide range of primary documentation, money laundering counter-measures will be examined in the context of parallel developments in the fields of international relations and crime prevention and control. It will be argued that their evolution is inextricably associated with the emerging reconceptualisation of security to include new categories of threats which are said to justify emergency measures to counter them. Money laundering counter-measures are thus viewed as security measures, which, due to their emergency character, have the potential to undermine fundamental legal principles and, ultimately, well-established social relations.

The analysis will focus on the evolution of money laundering counter-measures in the European Union. This choice is justified, apart from the character of the EU as a supranational institution imposing legislation directly on fifteen member states, primarily by the fact that it is the first organisation at the international level which provided a comprehensive, legally binding paradigm of money laundering

counter-measures, ranging from regulatory to criminal law and law enforcement ones. Starting from the cornerstone of EC legislation in the field, which is the imposition of duties on credit and financial institutions including their duty to co-operate with national anti-money laundering authorities, the analysis will extend to the pre-requisite of such co-operation, which is the establishment of a money laundering offence, and its consequence, which is the establishment and functioning of these authorities.

The evolution of money laundering counter-measures in the European Union will be examined in the light of prior, and parallel, international developments in the field in order to demonstrate the interrelation between the various initiatives in an attempt to establish a global anti-money laundering framework. The focus in this respect will be placed on the legal rules *per se*, without extending to an assessment of the role of various national and international 'players' in the making of these instruments. Such an attempt would extend beyond the scope of the analysis, which is to demonstrate that the EU counter-measures form part of a global effort to counter money laundering and to assess them taking such developments into consideration.

The analysis will then focus on the EC money laundering directive, which constitutes the cornerstone of the EU anti-money laundering framework. The extensive analysis of its content will be coupled with an overview of the history and controversies behind its adoption and an overview of the implementation of the provisions in the member states. The evolutionary character of the measures will be demonstrated by an overview of subsequent developments in the European Union and internationally, focusing on the recently proposed amendments to the directive. The most extensive part of the analysis will focus on the examination of the challenges posed to fundamental legal principles by the three parameters of the EU anti-money laundering model. The analysis will be based on both the content and implementation of the measures, focusing on selected issues of importance which have arisen in the member states. This will be particularly the case in the

examination of the national competent authorities, where very little has been done at the EU level.

The thesis however will begin by providing the theoretical framework placing this analysis in context. The basis of this framework will be an overview of the reconceptualisation of security in the international arena, in order to include a wide range of new threats. The impact of such reconceptualisation on the legal field will then be examined, both at national and international/EU level, focusing on measures aimed at countering the perceived security threat of organised crime and the challenges they pose for the law. Due to the close link of these measures with money laundering counter-measures, the analysis will serve as a general conceptual framework in order to assess the evolution of money laundering counter-measures in the European Union. In this context, the thesis is neither an attempt to 'measure' the threats of organised crime or money laundering, nor an assessment of whether such phenomena amount to real or merely imaginary threats, consciously refraining thus from using a 'moral panic' approach as its focal point. This choice is dictated in particular by the lack of concrete empirical data in the field. Following a similar *rationale*, the thesis will not attempt to provide an in-depth political analysis of the policy reasons behind this 'securitisation' process. In ascertaining this 'securitisation' through legal texts, the thesis will rather focus on examining the impact of this process at the legal level, on the nature and content of EU money laundering counter-measures.

1

The reconceptualisation of security in the international arena and its legal impact: the case of measures against transnational organised crime

1. (IN)SECURITY [1]

> '...no place for Industry, because the fruit thereof is uncertain: and consequently no Culture of the Earth, no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving and removing such things as require much force, no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short'[2]

The classical Hobbessian account of the ramifications of a security deficit has been reconstructed in several ways, and the absolute value of security qualified.[3] However, its conceptual validity retains its vigour in a multitude of contemporary security theorisations: security is still perceived in *negative* terms.[4] Its value lies in its antithesis with 'no society', danger and the 'continual feare' they entail. The quest for security is thus inextricably linked with contrary perceptions of insecurity, constructing an *(in)security nexus*, which permeates a significant strand of contemporary international relations theory. For Michael Dillon, it is encapsulated in the classical Greek concept of security as *a-sphaleia*,[5] bringing into the forefront discourses of danger and fear.[6] Security thus becomes a specific way of framing an issue:[7] any discourse of security, according to Dillon, 'must always, already, simultaneously and in a plurality of ways, be a discourse of danger too. For

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[1] Term Borrowed from M. Dillon (1996), *Politics of Security. Towards a Political Philosophy of Continental Thought,* Routledge, London and New York.

[2] T.Hobbes (1651), *The Leviathan*, Part I, ch. XIII, cited in R.H. Ullman (1983), 'Redefining Security' in *International Security*, vol.8, no.1, p.130.

[3] See Ullmann, *op. cit.*

[4] On the negative perception of security, see also S.Dalby (1992), Security, Modernity, Ecology: The Dilemmas of Post- Cold War Security Discourse, in *Alternatives*, vol.17, pp.97 *et seq.*

[5] Dillon goes into the hermeneutics of the term in the classical Greek context. He notes: '*Asphaleia* is the privative of the verb *sphallo-* i.e. *a-sphaleia. Sphallo* means to err, to cause to fall or fail, to bring down, trip-up (as in wrestling), to overthrow, defeat, baffle, disappoint or frustrate (for example, in respect of an oracle), or to make something or someone reel or stagger (as when drunk). It is translated into latin as *fallo-* to fall. In the noun form, it is a fault, failing or error,a false step, or mistake. Hence the privative *asphaleia* is to avoid falling, error, failure, or mistake. It is to make something stand, steadfastness, assured from danger, safe, steady, fortified, to be furnished with a firm foundation, to be certain, or sure'. Dillon , *op. cit.*, p.124.

[6] *Ibid.*, p.33.

[7] See O. Waever (1996), 'European Security Identities', in *Journal of Common Market Studies,* vol.34, no.1, p.106.

example, because security is engendered by fear (fundamentally aroused by the uncanny, uncertain, different, awesome and uncalculable) it must also teach us what to fear when the secure is being pursued'.[8]

The emphasis on the discursive elements in the construction of security, led to its recent theorisation by a leading school of thought as a self-referential practice: it is thus argued that 'it is in this practice that the issue becomes a security issue- not necessarily because a real existential threat exists but because the issue is presented as such a threat'. [9] This 'securitisation' process[10] goes hand in hand with the specification of the fear which engenders it.[11] Central thus in the security discourse is the position of *the threat.* This is eloquently expressed in one of the leading international relations analyses of security, where it is asserted that 'in the case of security, the discussion is about the pursuit of freedom from threat',[12] which is further analysed into 'what is perceived as 'hostile' forces of change'.[13] In this Self / Other dichotomisation, the perceived threat calls for emergency action to counter it, and thus preserve the Self identity which is constructed through this process. *Emergency measures* appear in the 'security drama' as justified due to the absolute prioritisation of the issue.[14] Along with the construction of threats, security seeks to 'proscribe, sanction, punish, overcome- that is to say, in its turn endanger that

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[8] Dillon, *op. cit.*, pp.120-21.

[9] B. Buzan, O. Waever and J. de Wilde (1998), *Security. A New Framework for Analysis*, Lynne Rienner Publishers, Boulder, London, p.124. See also Waever, *op. cit.*

[10] On the establishment of the term see O. Waever (1995), 'Securitization and Desecuritization' in R.D. Lipschutz (ed.), *On Security*, Columbia University Press, New York, pp. 46-86.

[11] Dillon, *op. cit.*, p.121.

[12] B. Buzan (1991i) *People, States and Fear. An Agenda for International Security Studies in the Post- Cold War Era*, Harvester Wheatsheaf, Brighton, pp.18-19, cited also in J. Huysmans (1995) 'Migrants as a Security Problem: Dangers of 'Securitizing' Societal Issues' in R.Miles and D. Thränhardt (eds.) *Migration and European Integration. The Dynamics of Inclusion and Exclusion,* Pinter, London, p.54. In a similar context J. Der Derian, referring to the genealogy of the concept, offers an understanding of security as a condition of 'being protected, free from danger, safety' ((1993)'The Value of Security: Hobbes, Marx, Nietzsche, and Baudrillard' in D. Campbell and M. Dillon (eds.) *The Political Subject of Violence*, Manchester University Press, Manchester and New York, p.97).

[13] B. Buzan (1991ii), 'New Patterns of Global Security in the Twenty- First Century', in *International Affairs*, vol.67, no.3, p.432.

[14] On the 'security drama' construct, see Huysmans, *op. cit.*, p.54. See also Waever, *op. cit.*, p. 106.

which it says threatens us'.[15] In this process, the perceived imminence of the need to adopt emergency measures provides legitimacy for the breaking of pre-exisitng rules and principles in order to counter what is deemed to be a threat in each case.[16]

In the assessment of the symbiotic relationship between perceived threats and emergency measures in the (in)security nexus, a fundamental question arises: 'whose security'?[17] In one of the first major reconceptualisations of security in the context of the international system reference is made to 'the ability of states and societies to maintain their independent identity and their functional integrity'.[18] This approach has been challenged on a number of grounds, centred on: the inadequacy of the state and the ambiguity of 'society' as analytical tools; and the general, catch-all reference to identity maintenance. In assessing the validity of these challenges, it is important to highlight the critique put forward regarding the failure of this scheme to distinguish between the concepts of *actor* and *referent object* in the security discourse.[19] This distinction is of vital importance in the understanding of the reconceptualised challenges in the security triangular scheme, read now as one of: *threat - emergency measures – (securitising) actor / referent object.*

2. THREATS AND BEYOND: RECONCEPTUALISING SECURITY IN THE RISK SOCIETY

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[15] Dillon, *op. cit.*

[16] Buzan *et al.* argue in this respect that 'securitization is not fulfilled only by breaking rules (which can take many forms) nor solely by existential threats (which can lead to nothing) but by cases of existential threats that legitimize the breaking of rules.' *Op. cit.,* p.25.

[17] See Dalby, *op. cit.,* p.103.

[18] Buzan in Huysmans, *op. cit.*

[19] Waever, *op. cit.*, pp. 107 *et seq.* Emphasis added. This distinction has been refined in the recent book by Buzan et al. to include: *referent objects*, i.e. things that are seen to be existentially threatened and that have a legitimate claim to survival; *securitising actors*, i.e. actors who securitise issues by declaring something- a referent object- existentially threatened; and *functional actors*, i.e. actors who affect the dynamics of a sector, in influencing significantly distinctions in the field of security. *Op. cit.*, p.36.

Already in the beginning of the 1980's, academic writings began to question the traditional conception of security based solely on *military threats* at the *state* level. In 1983, R. Ullman attempted to redefine security, proceeding 'from the assumption that defining national security merely (or even primarily) in military terms conveys a profoundly false image of reality'.[20] This assumption was later justified by rapid changes in the international arena, *vis - à- vis* increasing globalisation and economic interpenetration and the metamorphosis of the post - Cold War political landscape. In the beginning of the nineties, that the classical post- second World War security dilemma posed by Herz,[21] has been replaced by a series of new 'security dilemmas' was widely acknowledged,[22] along with their construction through a series of new threats and enemies.[23]

These new threats range from encompassing 'resource, environmental and demographic issues',[24] to Walker's assertion of the possibility of defining the meaning of security in relation to 'social, cultural, economic and ecological processes, as well as to geopolitical threats from foreign powers'.[25] The shift from the exclusively military conception of threat towards what has been deemed as a 'horizontal extension' of the security concept,[26] has been epitomised in the analysis of Buzan, who, in 1991, constructed a five-sector model of security, aiming to embrace the emerging diversity of perceived threats. According to Buzan's model, security can be distinguished into: *military*, concerning the 'two - level interplay of the armed offensive and defensive capabilities of states, and state's perceptions of each other's intentions'; *political*, concerning the 'organizational stability of states,

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[20] Ullman, *op. cit.*, p.129.
[21] See J. H. Herz (1950), 'Idealist Internationalism and the Security Dilemma' in *World Politics,* vol.2, no.2, p.157.
[22] See Dalby, *op. cit.*, where the new 'security dilemma' discourse forms the very title of the article.
[23] As R. C. Johansen notes, 'a more comprehensive concept of security begins to incorporate non-military threats, the concept of 'enemy' also changes': (1991) 'Real Security is Democratic Security' in *Alternatives,* vol. 16, p.213.
[24] J. Tuchman Mathews (1989), 'Redefining Security' in *Foreign Affairs*, vol.68, no.2, p.162. On the securitisation of environmental issues see Dalby, *op. cit.*
[25] R.B.J. Walker (1990), 'Security, Sovereignty, and the Challenge of World Politics' in *Alternatives*, vol.15, p.4.
[26] E. Rotschild (1995), 'What is Security?' in *Daedalus*, vol.124, no.3, p.55.

systems of government, and the ideologies that give them legitimacy'; *economic*, concerning 'access to the resources, finance and markets necessary to sustain acceptable levels of welfare and state power'; *societal*, concerning 'the ability of societies to reproduce their traditional patterns of language, culture, association, and religious and national identity and custom within acceptable conditions for evolution', and *environmental*, concerning 'the maintenance of the local and the planetary biosphere as the essential support system on which all other human enterprises depend'.[27]

This model is central in the reframing of the security debate, as one of the first attempts to place the emerging 'new' security conceptualisations into a systematic analytical framework. Its significance is enhanced by Buzan's acknowledgement of the close interconnection between the different 'security' sectors, which 'do not operate in isolation from each other', being all 'woven together in a strong web of linkages',[28] which has been highly influential for subsequent security theorisations. A clear illustration is the work of Anderson *et al.* in the context of EU policing, asserting that the redefinition of security threats 'illustrates a partial merger between the domains of internal and external security',[29] using this merging as an analytical tool. Such changes are now commonly acknowledged within international *fora*. A recent article by the Chairman-in-Office of the Organisation for Security and Co-operation in Europe is indicative:

> 'Fortunately, the military threat is no longer dominant. But the risks and challenges have taken on new dimensions. These include historically based mistrust and friction between ethnic, religious or national groupings, aggressive nationalism, social disruption and uncertainty in light of fundamental economic reforms, illegal migration, drug trafficking

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[27] Buzan (ii), *op. cit.*, p.433.
[28] Buzan (ii), *op. cit.*
[29] See characteristically Anderson *et al.* (1995), *Policing the European Union*, Clarendon Press, Oxford, chapter 5, pp.156 *et seq.*

and organised crime, and environmental and ecological threats evolving from years of exploitation of natural resources and uncontrolled industrialisation'.[30]

However, the model was not immune from criticism. One of its main attacks has been put forward by Walker, who, while acknowledging that 'Buzan undoubtedly offers a persuasive critique of the fetishisation of the military postures and capabilities of states understood within a broader context, as part of some kind of interstate order',[31] attacks Buzan's model on the grounds that he 'is left with no option but to rearrange and revalorise categories which gave rise to the problems he is trying to resolve',[32] since his model is still based solely on state security. A significant attempt to surpass the narrow state-security model has been put forward by Walker, who, on the premise of the assertion that 'demands are issued for a broader understanding of whose security is at stake for an effective account of the security of *people in general*, not just for the inhabitants of particular states',[33] formulated the concept of *world security*, encompassing forms of (in)security such as ethnic conflict, terrorism, human rights, maldevelopment, famine and environmental degradation. In this manner, the security field is simultaneously opened to individual and global security concerns which 'all stimulate far-reaching debates about who we are'.[34]

Notwithstanding its apparent friendliness to international developments leading to the increased weakening of the state as an international actor/object of security, Walker's analytical shift caused considerable concern because of its generous extension of the security field. The dangers of such extension have been most recently raised by Freedman, who has stated his concern that 'once anything that

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[30] N. H. Petersen (1997), 'Towards a European Security Model for the 21st Century' in *NATO Review*, Nov.-Dec., p.4.

[31] R.B.J. Walker (1993), *Inside/Outside: International Relations as Political Theory*, Cambridge University Press,p. 139.,

[32] Walker (1993), *op. cit.*, p.140.

[33] *Ibid.* at p.2. Emphasis added.

[34] Walker (1990), *op. cit.*, pp.23-24. On Walker's model of world security, see also L.Hansen (1997), 'R.B.J. Walker and International Relations: Deconstructing a Discipline' in I.B. Neumann and O.Waever (eds.), *The Future of International Relations. Masters in the Making?*, Routledge, London, New York, pp.316-336.

generates anxiety or threatens the quality of life in some respect becomes labeled a 'security problem', the field risks losing all focus'.[35] This concern has also been reflected in the writings of Weaver who acknowledged that 'if one departs from the 'middle level'- the state – it is paradoxically quite easy to move simultaneously all the way up and all the way down'.[36] He thus raised an analytical and political case for the development of 'an inbetween concept of security, somewhere between the narrow (always state, only military) and the wide (everything people worry about)'.[37] In this context, Waever elaborated the concept of *societal security*, concerning 'the ability of a society to persist in its essential character under changing conditions and possible or actual threats', embracing in this manner *'situations when societies perceive a threat in identity terms'*.[38] The extension of threats is thus accomodated only having as a referent object what was deemed as 'identity - based communities'.[39] In elaborating this framework, of what has been otherwise called 'pluralistic security communities',[40] Waever recently clarified that societal security must not be perceived as one of the five Buzan's sectors, arguing in favour of two kinds of security: state security and societal, or identity security.[41]

A major critique on Waever's theoretical directions towards an identity security has been put into the fore by Bigo.[42] Starting from the premise that the merging of internal and external security by no means corresponds to an increase in threats in

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[35] L. Freedman (1998), 'International Security: Changing Targets' in *Foreign Policy*, Spring 1998, p.53.
[36] Waever, *op. cit.*, p.104.
[37] *Ibid.*, p.106.
[38] Waever *et al.* (1993), *Identity, Migration and the New Security Agenda in Europe*, Pinter, London, p.23. Emphasis added. Also Waever, *op. cit.*, p.113.
[39] Waever , *op. cit.*, p.113.
[40] See Adler, arguing that 'the concept of pluralistic security communities, coupled with a constructivist approach, offers a way to reorder our thinking about international security in the post - Cold War period, shifting the focus of security studies away from states and towards transnational social, political, economic, ecological and moral forces' and characterising security communities as 'transnational cognitive regions whose people possess collective identities, and share other normative and regulatory structures'. In E. Adler (1997), 'Imagined (Security) Communities: Cognitive Regions in International Relations' in *Millennium: Journal of International Studies,* vol.26, no.2, p.276.
[41] O.Waever (1998), 'Insecurité, Identité: Une Dialectique Sans Fin' in A.M. Le Gloannec (dir.), *Entre Union et Nations. L'État en Europe,* Presses de Sciences Politiques, Paris, p.98.

the contemporary era, Bigo argues that it is rather the case of lowering the level of acceptance of the Other; or else, the *'insecuritisation'* of everyday life by security professionals and a rise in power of a policing logic.[43] This approach may share Waever's framing of security as an identity issue, but distances itself from it in two respects. First, in highlighting the centrality of the *production* of (in)security perceptions. And second, in shifting the security construct focus from the assessment of threats to the adoption of emergency measures to counter them; an aspect which is marginal in international relations reconceptualisations of security. The emphasis on emergency measures is shared by Anderson *et al.*, whose landmark publication on EU policing expressly includes in the security construct notions of 'control', 'law enforcement', or 'public policy', embracing both the level and form of military control or policing, as well as the *raison d' être* of control.[44]

The tensions within the threat - control nexus are highlighted when placed within the context of the *'risk society'* discourse. According to the creator of the term, Ulrich Beck, risk society defines a phase of evolution of modern society, in which social, political, ecological and individual risks, engendered by the dynamics of renovation, shift more and more at instances of control and security of industrial society.[45] This happens through a selection process. Risks are always based on decisions, existing because insecurity and dangers *are transformed* into decisions - and demand decisions which in their turn produce risks.[46] In this process, the light is cast on the future.[47] The 'not - yet - event' becomes a stimulus to action, as in the

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[42] D. Bigo (1998), 'L'Europe de la Securité Interieure: Penser Autrement la Securité' in Le Gloannec, *op. cit.*, p.55.
[43] *Ibid.*, pp. 84-85.
[44] Anderson *et al.*, *op. cit.*, p.158.
[45] U. Beck (1994), 'D' une Théorie Crtique de la Société vers la Théorie d' une Autocritique Sociale' in *Déviance et Société*, vol. 18, no.3, p. 333.
[46] Beck, *op. cit.*, p.335. Emphasis added.
[47] 'Risk seems to look forward: it is used to assess the dangers ahead': M. Douglas (1990), 'Risk as a Forensic Resource' in *Daedalus*, vol.119, no.4, p.5.

'catastrophic' risk society, risks are connected with 'anticipation, with destruction that has not yet happened but is threatening'.[48]

This climate of anticipation leads to the need for what Beck terms a *'promise of security'*, which grows with the risks and destruction and must be 'reaffirmed over and over again to an alert and critical public through cosmetic or real interventions in the techno - economic development'.[49] It is in this context that reconceptualised threats - which have become risks constituting a 'kind of virtual, yet real, reality'[50] - meet a necessity for reconceptualised measures to counter them. Such measures are geared primarily towards future, anticipated risks, aiming at changing social reality in order to prevent them:[51] along with the 'securitisation' of discourses of control[52] thus comes *prevention* as a key concept in the regulation of security in risk society. No *locus* is more illustrative of this mechanism than the security nexus of one of the most frequently evoked 'new' threats: that of transnational criminality.

3. THE SECURITISATION OF ORGANISED CRIME : THE THREAT AND THE MEASURES TO COUNTER IT

I THE THREAT

A clear illustration of the emergence of organised criminality as a perceived threat in the new security landscape can be encountered in the opening article of an academic journal specifically focused on - and entitled - 'transnational organised crime'. The author argues that:

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[48] U. Beck (1992) *Risk Society. Towards a New Modernity*, Sage, London, p.33. On the 'catastrophic' term, *ibid.*, p.24.

[49] Beck (1992), *op. cit.*, p.20.

[50] U. Beck (1998), 'Politics of Risk Society' in J. Franklin (ed.), The Politics of Risk Society, Polity Press (published in association with the Institute for Public Policy), p.11.

[51] Beck (1998), *op. cit.* noting that: 'the greater the threat (or to be more precise, the social definition and construction of the threat), the greater the obligation and power to change current events'.

> ' In the new world order the nationally constituted state is not about to disappear or diminish radically in importance... Rather, with the growth of various supranational institutions (e.g. global capitalism and the global media system) and the technologies of rapid communication and travel, the boundaries between societies have become quite porous. Internal societal affairs are increasingly oriented to the outside world by various factors including the internationalization of national economies as well as by the greater consciousness of the globe as such. The 'official' line between domestic and foreign affairs has been disappearing. Nowhere has this been truer (but least recognized) than in the fields of crime and criminal justice, especially since World War II'.[53]

The inclusion of transnational criminal organizations in the changing security landscape marked the departure from narrow military threats. The securitisation process now refers to threats broad enough to undermine the 'effective functioning of society'.[54] Such theorisation of security is inextricably linked with discourses on organised criminality, facilitated by the addition of the 'transnational' element, as a threat to the very fabric of society. Extending simultaneously up and down, the threat is perceived in a three-fold manner: against the individual, the state and the international system of states.[55]

The 'securitisation' of transnational organised crime was systematised at the United Nations level in the 1995 Conference on the matter. In the conference report it is opined that 'threats to international security in the 1990s are less direct and apocalyptic than they were during the Cold War'[56] and also 'more diffuse and insidious'.[57] The Report further acknowledges that 'one of the most serious of

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[52] P. O'Malley (1992), 'Risk, Power and Crime Prevention' in *Economy and Society*, vol.21, no.3, p.254.
[53] W.F.McDonald (1995), 'The Globalization of Criminology: The New Frontier is the Frontier' in *Transnational Organized Crime*, vol.1, no.1, pp.6-7.
[54] P. Williams (1994), 'Transnational Criminal Organisations and International Security' in *Survival*, vol.36, no.1, p.107.
[55] *Ibid.*
[56] P. Williams and E. Savona (1996), *The United Nations and Transnational Organised Crime*, Frank Cass, London, p. VII
[57] *Ibid.*

these threats is that posed by transnational organized crime'.[58] This 'insidious, pervasive and multifaceted threat' is further analysed as a threat to: *sovereignty*, which, due to the permeability of national borders loses much of its real significance; *societies*, whose fabric is undermined by activities such as drug abuse, organized crime and corruption; *individuals*, who are deprived of a safe environment without fear of violence or intimidation; *national stability and state control*, creating a rival authority structure or a 'state within the state' based on a parallel or black market economy; *financial institutions* through their infiltration with criminal money and objectives; *democratization and privatization* in countries in transition; *development*, through the diversion of resources in response to criminal activities, corruption and deprivation of the poor members of society; and *global regimes and codes of conduct*, through various alliances of convenience between transnational criminal organisations and 'rogue or pariah states'.[59]

It is evident that this all-encompassing conception of security is marked by the inclusion of a wide range of security referent objects, reflecting at the same time the merging of internal with external security. The perceived threat of organised criminality is geared against interests as diverse and uneven as the survival of individuals, social institutions, states and the very functioning of the international system; thus bringing to the fore and challenging simultaneously the limits of 'societal security' as an analytical tool. Its securitisation and the emergency measures it entails challenge in a significant manner fundamental legal principles. The evolution of these challenges obtains a further dimension, due to the transnationalisation of organised crime, which is linked with the globalisation of both securitisation processes and subsequently adopted emergency measures.

II. EMERGENCY MEASURES IN THE PREVENTION STATE

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[58] *Ibid*, p.32.
[59] *Ibid.*, pp. 32-39. Emphasis added.

A. Increasing criminalisation and displacement in punishment

The broad securitisation of transnational organised crime poses significant challenges at the legislative level. These challenges become even more acute within the logic of risk society, marked by the emergence of what has been deemed as the *'prevention state'*.[60] According to Baratta and Wagner, the 'prevention state' is characterised by a tendency towards normative production and by decision mechanisms which are incessantly being reorganised to form a reaction *in a state of structural emergency*.[61] In this manner, the perceived threats are placed within a 'normalisation' process, primarily through an augmenting recourse to a criminal law logic and production.[62] As Pavarini notes, criminal law is transformed into 'an internal element of social conflicts', with the definition and distribution of criminality being now only a 'risk' of social competence, as an 'inevitable consequence of the hypertrophic process of social control'. [63] In this manner, according to Albrecht, '...the universal political promise of security seems equally guaranteed in front of modern progress risks which lose their anonymous and threatening character and their high variability degree, being identified and somehow englobed in the known form of 'the criminal''.[64]

Such demonstration of 'political capacity'[65] is primarily expressed through an increasing recourse to a *'juridification process'*[66] reflected in the creation of a

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[60] Term introduced by E. Denninger (1988), 'Der Präventions-Staat' in *Kritische Justiz*, vol. XXI, p.1. The prevention state discourse has recently been adopted by the then French prime Minister A. Juppé, speaking about the 'social regulatory state, baptised as ..prevention state'(*'l'État regulateur social, baptisé il y a encore peu 'État providence'*); A. Juppé (1997), 'La Securité Interieure Aujourd'hui' in *La Lettre. Informations sur les Activites de l' IHESI,* no.16, Janvier, p.3.

[61] A. Baratta and H. Wagner (1994), 'Débat: Société du Risque et Contrôle Social. Risque, Securité et Democratie' in *Déviance et Société*, vol.18, no.3, p.332. Emphasis added.

[62] In a very recent article, Baratta talks about the emergence of 'a new form of criminal law of emergency', where the criminal law and justice system becomes from *ultima ratio, prima ratio*. A. Baratta (1999), 'Droits de l' .Homme et Politique Criminelle' in *Déviance et Société*, vol.23, no.3, p.246.

[63] M. Pavarini (1994), 'Primera Conferencia. A Donde Vamos?' in *Capitulo Criminologico*, no.22, p.11.

[64] P.-A. Albrecht (1997), 'La Politique Criminelle dans l'État de Prévention', in *Déviance et Société*, vol.21, no.2, p.129.

[65] *Ibid.*

series of new offences. This process is coupled with what has been described under the French term 'judicialisation', consisting in an increasing appeal to criminal law and the criminal justice system in order to protect interests protected by law (*biens juridiques*), which in their turn are transformed more and more into collective interests, such as the environment, trust in the financial system, consumer safety or public order.[67] The broadening of interests demanding legal protection is inextricably linked with the extension of perceived threats so far analysed. In the case of transnational organised crime, it is a variety of interests such as individual well being, financial stability, development and the maintenance of the 'social fabric' that are deemed to deserve protection. By calling for legislative measures, notably in the criminal law sphere, in order to face the threat, the political responsibility to curb social issues is transferred to the legal, and more specifically to the criminal justice system.[68]

In a number of writings, this transfer has been associated with the phenomenon of the 'dynamisation' of interests protected by law.[69] According to Baratta, this dynamisation entails the following consequences: first of all, a deplacement in the relations between state and society, regarding the production and protection of interests protected by law. In contrast with the classical liberal model of the state of legal certainty,[70] where the real supports of these interests are produced within civil society, in the 'prevention' state, the interests to be protected by law are increasingly produced by the state itself, relative to the infrastructures, organisations and functions having a link to the activity of the state and public institutions.[71] The dynamisation of interests protected by law is further encountered in the development of techniques of imputation of criminal

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[66] On the term see J.A.E.Vervaele (1997), 'Régulation et Répression au Sein de l'État Providence. La Fonction 'Bouclier' et la Fonction 'Épée' du Droit Pénal en Desequilibre' in *Déviance et Société,* vol.21, no.2, p.121.

[67] *Ibid.*

[68] On this prcess see A. Baratta (1991), 'Les Fonctions Instrumentales et les Fonctions Symboliques du Droit Pénal' in *Déviance et Société*, vol.15, no.1, p.9.

[69] *'Dynamisation' des biens juridiques'*. See Baratta, *op. cit.*, p.9, citing Denninger, *op. cit.*

[70] *'securité de droit'*

[71] Baratta, *op. cit.* p.11.

responsibility, which deplace progressively the punitive level[72] towards phases prior to the act, thus prior to the attack of the interest under protection.[73] This trend is an offspring of the link between the increasing juridification and the widening of protected interests.

A clear illustration of this tendency is the appearance in the criminal law of what N. Abrams called in 1989 the 'new ancillary offences'.[74] These fall into a category which departs in a number of respects from the traditional model, under which a crime is committed when a person, acting with the requisite mental state, causes an identifiable harm either to a person or to a property interest. This 'primary' or 'substantive' crime model is complemented by a model of offences characterised 'by group activity or conduct leading up to, or involved generally in, the commission of substantive offences'.[75] Going beyond Baratta's assertion, Abrams also refers to the criminalisation of 'conduct practiced in the aftermath of a primary harm crime'.[76]

After offering a classification of the new ancillaries,[77] Abrams places emphasis on their common characteristics stating that: ' they are defined in terms that make them applicable in connection with many different kinds of criminal conduct. For many of these offenses the *actus reus*, viewed from afar, is innocent; in such cases, the principal index of criminality is the mental state of the offender. Some of them also can be used to prosecute conduct that is on the border between criminal

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[72] '*seuil de punissabilité*'
[73] *Ibid.*
[74] N. Abrams (1989), 'The New Ancillary Offences' in *Criminal Law Forum*, vol.1, no.1, p.1.
[75] *Ibid.*, p.2.
[76] *Ibid.*
[77] Abrams distinguishes between: *derivative offences*, or crimes 'an element of which involves proof that a primary harm offense was committed or intended to be committed'; *enforcement and information - gathering offences*, that 'either are committed in the course of a law enforcement investigation that may be directed toward primary harm crimes or involve a failure to provide required information that may be useful as a lead to a criminal investigation of such offenses'; and *catchall crimes*, such as mail and wire fraud. The derivative offences are further distinguished between after-the-fact crimes such as money laundering offences and organisational crimes, or conspiracy-like offences. Bank Secrecy Act violations and the False statement offence are cited as examples of enforcement and information gathering offences. Abrams, *op. cit.*, pp.5-27.

conduct, on the one hand, and merely unethical, unprofessional conduct, on the other. For the most part they are treated as serious crimes, carrying very heavy penalties'.[78] In view of these characteristics, Abrams warns, these offences can cause 'a number of harmful systemic effects'.[79] More specifically, he claims that their overuse 'can erode the traditional concept of crime both by shifting attention from the primary harms that historically have been the core of the criminal law and by giving more emphasis to the mental element of crime, arguably reflecting a 'dangerous person' rather than a dangerous offense philosophy'.[80]

Abram's concerns do justice to the assertion by Tamar Pitch that 'criminalisation does not mean simply the addition of some new forms of behaviour to the already existing list of crimes; it also means that certain activities and situations undergo *conceptual* and *cognitive* revision, which in turn implies the creation of a *new knowledge* around those activities and situations'.[81] This new knowledge emanates from a securitised discourse aimed at protecting an ever - expanding category of 'legal goods'. In marginalising individual protection in the classical liberal sense through the adoption of measures aimed at protecting abstractions such as the 'social fabric', the criminal law increasingly controls mental elements, and subsequently what Baratta has deemed as 'the fidelity of the subject to the system and the state'.[82]

The perception and regulation of organised crime provides strong backing for this assertion. Securitising the organised crime groups, Williams and Savona view their existence as a threat *per se*.[83] This threat is perceived as 'self-contained, because a criminal group is established with a view to committing any activity worth being

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[78] Abrams, *op. cit.*, pp.3-4.
[79] Abrams, *op. cit.*, p.4.
[80] *Ibid.*
[81] T. Pitch (1995), *Limited Responsibilities: Social Movements and Criminal Justice*, London, Routledge, p.72. Emphasis added.
[82] Baratta, *op. cit.*, p.12.
[83] Williams and Savona, *op. cit.*, p.129.

exploited, striving to build it up and exercising the power that goes with it'.[84] This highly moralised and subjective evaluation is reflected in the legislative crusade against organised crime. The European Union Extradition Convention,[85] is indicative in this respect, by calling the Member State to make extraditable

> 'the behaviour of any person which contributes to the commission by a group of persons in the field of terrorism..., drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons, punishable by deprivation of liberty or detention order of a maximum of at least 12 months, *even where that person does not take part in the actual execution of the offence or offences concerned*'[86]

The securitisation of the phenomenon with the subjectivity it entails, brings into consideration the Foucauldian discourse on the 'dangerous individual',[87] and signals the departure from a criminal law 'oriented towards the citizen' to an authoritarian conception of criminal law oriented towards the enemy'.[88]

B. The responsibilisation strategy

Within this specific 'horizon of perception',[89] the 'prevention state', rather than civil society, is in charge of the production and distribution of interests protected

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[84] *Ibid.*

[85] OJ C 313, 23.6.1997, p.12

[86] Article 3(4), emphasis added. A similar logic is reflected in the EU Joint Action on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L351, 29.12.1998, p.1. Article 2(1)(a) for instance criminalises conduct under certain conditions even where that person does not take part in the actual execution of the offences concerned and even where these offences are not actually committed. For further analysis, see chapters 3 and 4.

[87] In his writing on the dangerous individual, Foucault ends as follows: 'when a man comes before his judges with nothing but his crimes, when he has nothing else to say but 'this is what I have done', when he has nothing to say about himself, when he does not do the tribunal the favor of confiding to them something like the secret of his own being, then the judicial machine ceases to function', in 'The Dangerous Individual' in L.D.Kritzman (ed.) (1988), *Michel Foucault. Politics, Philosophy, Culture. Interviews and Other Writings 1977-1984*, Routledge, New York and London, p.151.

[88] *Ibid.*, citing G. Jakobs (1985), 'Kriminalisierung im Vorfeld einer Rechtsguterverletzung' in *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol.XCVII, p.775.

[89] Albrecht, *op. cit.*, p.129.

by law. However, and most significantly, the prevention state becomes in charge of the *administration of risks* associated with their production.[90] In the effort to control risks through the 'normalisation' of everyday social activities,[91] the state chooses not to assume exclusive responsibility: the rejection of political responsibility through the recourse to what has been called the 'criminal law of prevention',[92] is thus coupled with a displacement of responsibility with regard to *the control* of risks. In the field of crime prevention and control, such displacement is theorised in the context of what has been called 'the erosion of the myth of sovereign crime control', i.e., that the sovereign state is capable of providing security, law and order, and crime control within its territorial boundaries.[93]

Apart from their impact on the *internationalisation* of measures against crime,[94] such developments give rise to the phenomenon of *'internalisation'* in crime prevention and control.[95] Following what has elsewhere been classified as a *'responsibilization strategy'*,[96] the state acts in an indirect manner, seeking to activate non-state agencies and organisations in the fight against crime. The recurring message of this approach is that the state alone 'is not, and cannot be responsible for preventing and controlling crime'.[97] What Ericson and Haggerty have deemed as 'the decline of innocence' in the private sector, is accompanied by a rise in individual responsibility in the field of crime control, implying that 'each individual must be reflexive with respect to his or her actions to ensure that he or she does not increase the risk of loss'.[98] In this manner, security becomes increasingly 'a matter for the private, or rather the non-institutional, non-public

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[90] Baratta, *op. cit.* citing Denninger, *op. cit.*
[91] Term used by D. Garland (1996), 'The Limits of the Sovereign State. Strategies of Crime Control in Contemporary Society' in *British Journal of Criminology*, vol.36, no.4, p.450.
[92] Albrecht, *op. cit.*, p.128.
[93] Garland, *op. cit.*, p.448.
[94] See also the relevant analysis on globalisation further in this chapter. On the 'internationalisation' term, see Anderson *et al.*, *op. cit.*
[95] *Ibid.*
[96] Garland, *op. cit.*, pp. 452-455. For an extensive analysis in the context of money laundering counter-measures, see chapters 3 and 6.
[97] Garland, *op. cit.*, p.452.
[98] R.V. Ericson and K. D. Haggerty (1997), *Policing the Risk Society*, University of Toronto Press, Toronto and Buffalo, p.52.

sphere'.[99] This predicament is vividly reflected in the United Nations Action Plan against transnational organised crime, where it is asserted that 'owing to the inherent characteristics of organized crime, which is simultaneously engaged in providing illegal services and goods and infiltrating the legitimate economy, the criminal justice alone cannot successfully fight it'.[100]

C. The centrality of knowledge

In this context, the United Nations has called for a combination of policies of prevention and control to counter transnational organised crime. While the latter are intended 'to control the crimes committed by organized crime groups' preventive policies 'are designed to reduce the opportunities for criminal activity and to minimize the vulnerability of legitimate business to the infiltration of organized crime'.[101] In this quest, it is explicitly stated that 'one of the most important commodities in the efforts to deal with transnational criminal organizations is *information'*. [102] The acknowledgement of the centrality of information in policies of crime prevention and control in the framework of risk society, has been clearly demarcated by Ericson and Haggerty, stating that: 'in risk society, policing is not just a matter of repressive, punitive, deterrent measures to control those who are morally wrong. It is also a matter of surveillance, of *producing knowledge* of populations that is useful for administering them'.[103] The emphasis on surveillance, they continue, 'redirects the law, the police, and risk

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[99] M. Pavarini (1997), 'Controlling Social Panic: Questions and Answers about Security in Italy at the End of the Millennium' in R.Bergalli and C. Sumner (eds.), *Social Control and Political Order. European Perspectives at the End of the Century*, Sage, London, Thousand Oaks, New Delhi, p.79.
[100] Williams and Savona, *op. cit.*, p.44.
[101] Williams and Savona, *op. cit.*, p.123.
[102] Williams and Savona, *op. cit.*, p.92. Emphasis added.
[103] Ericson and Haggerty, *op. cit.*, p.41. Emphasis added. On a similar analysis and the rejection of the distinction between information and knowledge, see R.V.Ericson (1995), 'Promoting Security: The Division of Expert Knowledge Policing' in K. Miyazawa and S. Miyazawa (eds.), *Crime Prevention in the Urban Community*, Kluwer Law and Taxation Publishers, Deventer, Boston, pp. 27-29.

institutions to continually invent new ways of accessing and distributing knowledge'.[104]

The centrality of accession to and distribution of knowledge in risk society is inextricably linked with increasing regulation. Asserting that 'risk society is a regulatory society', Ericson and Haggerty argue that 'there has been an expansion of regulatory systems within a compliance model of law enforcement'.[105] With compliance perceived as 'not merely the decision to refrain from an act but the doing of something positive to ameliorate the condition or state of affairs and to reach a negotiated standard',[106] it is evident that this model encompasses both Abrams' new ancillaries, and Garland's responsibilisation strategy.

The change in the actors of crime prevention and control is, according to recent criminological theory, associated with changes in the goals and perceptions of criminal policy. A crucial role in this new framework is played by the emergence of what has been called 'the criminologies of everyday life'. [107]According to Garland, these criminologies reflect with the development of 'the criminogenic situation', which 'poses difficulties for government because it generally has a commercial or social value of its own which sets limits upon crime control. Precisely because crime occurs in the course of routine social and economic transactions, any crime-reducing intervention must seek to preserve 'normal life' and 'business as usual'. [108] This leads not only to the shift towards 'responsibilising' individuals aiming at making them 'active parties in the business of security and crime control',[109] but bears significant consequences for the character of knowledge administration and law enforcement., geared now towards administering every day activities. The

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[104] *Ibid.*
[105] Ericson and Haggerty, *op. cit.*, p.48, talking about 'regulatory law'.
[106] Ericson and Haggerty, *op. cit.*, p.49.
[107] Garland, *op. cit.* Also D. Garland (1997i), 'Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology' in *Theoretical Criminology*, vol. 1, no. 2, pp.173-214.
[108] Garland,1997i, p.187. For an analysis of the 'criminologies of every day life', see also D. Garland (1997ii) ,'The Punitive Society: Penology, Criminology and the History of the Present' in *Edinburgh Law Review,* vol.1, pp.188 *et seq.*
[109] *Ibid.*

compliance-based law enforcement suggested by Ericson and Haggerty differs thus substantially from deterrent law enforcement under criminal law, 'for it addresses undesirable organizational activity that takes the form of conditions or states of affairs (such as pollution of the environment) rather than 'individual acts''.[110]

In this context, and in a parallel process with the shift from the criminalisation of the act to the control of behaviour or 'dangerousness', the nature and context of law enforcement changes dramatically, with the collection of information being geared at 'repressive action before even the commission of the offence'.[111] As Bigo notes, this leads to a *'coercive virtual dimension'*, new in crime prevention: 'before' and 'after' crime is substituted by 'before' and 'after' a signal that a crime could be committed'.[112] 'We are', he continues, 'in a time of perceptions, of virtuality, rather than in a time of the commission of deeds, of reality'.[113]

4. THE CHALLENGES OF 'SECURITISED' MEASURES AGAINST ORGANISED CRIME TO FUNDAMENTAL LEGAL PRINCIPLES

I. THE CHALLENGE FOR THE CRIMINAL LAW

The juridification/judicialisation process adopted to respond to the threat of organised crime has resulted in the adoption of measures which are marked by two main features: the emergence of a variety of 'collective goods' deserving protection, with individual rights increasingly being replaced by collective needs of

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[110] Ericson and Haggerty, *op. cit.*
[111] D. Bigo (1997), 'La Recherche Proactive et la Gestion du Risque' in *Déviance et Société*, vol.21, no. 4, p.423.
[112] *Ibid.* Emphasis added.
[113] Bigo, *op. cit.*, p.424.

protection 'supposedly menaced by organised interventions'.[114]; and, through the 'judicialisation' process, by the movement from the punishment of the act towards punishing behaviour. The tension of such developments with well-established principles of the criminal law will be examined here through insights offered by the Italian legislation to counter organised criminality and academic reactions to it.[115]

Analysing the Italian legislative framework against organised crime, Moccia argues that the juridification/judicialisation phenomenon results in the *distance* between the criminalised behaviour and the protected interest, since the behaviour which is criminalised is 'greatly distanced from the effective realisation of harm'.[116] This tendency marks what Moccia characterises as 'regressive aspects of the Italian penal system', analysed further in regression from a series of fundamental principles of Italian criminal law: the principle of *determinatezza*, concerning the precise and punctual character of the incrimination norm, and the principles of *materialità* and *offensività*, enshrined in the necessity of a material and perceptible attack on an interest protected by law.[117]

In this context, the theorisation of the concept of 'interest protected by law' is essential. Beginning with the principle that the *start* of the penal interest lies in objects of the *external* world with their natural and social properties, on which law departs to form its values in a 'concise and realistic manner',[118] the recourse to all-embracing collective interests appears problematic. Moccia, in his examination of the offence of the *'association des malfaiteurs'* in the Italian legal order, asserts that 'it is difficult to find an autonomous protected interest which founds the

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[114] Albrecht, *op. cit.*, p.124, noting that 'while in the previous penal theories the individual had the status of the subject, (s)he is now substituted for the social system'.

[115] From the abundant literature, see in particular S. Moccia (1997), 'Aspects Regressifs du Système Pénal Italien' in *Déviance et Société*, vol.21, no.2, p.137; F. Palazzo (1995), 'La Législation Italienne en Matière de Criminalité Organisée' in *Revue de Science Criminelle*, no.4, p.711; M. Papa (1993), 'La Nouvelle Législation Italienne en Matière de Criminalité Organisée' in *Revue de Science Criminelle*, no.4, p.725.

[116] Moccia, *op. cit.*, p.143.

[117] Moccia, *op. cit.*, p.138.

[118] I. Manoledakis (1989), *Criminal Law* (in Greek), 2nd ed., Sakkoulas editions, Thessaloniki, p.96.

category'.[119] To the views that support the need for protection of collective goods such as state personality or public order, Moccia's reaction is to view such interests not as a *real object*, but rather as a *ratio* of protection.[120]

Such theorisation serves as a weapon against the danger of infiltrating the objectivity of legal goods with abstract values, leading to the formulation of what has been deemed as a 'duty of fidelity' to the state and transposing the protection offered by criminal law into a metaphysical dimension.[121] As Manoledakis notes, the replacement of objectively defined interests with ideals of that kind and the infiltration of the concept with values which are not capable of being personified into outer world objects or their natural or social properties, but are conceived straightly in the abstract sphere of ideological constructs, undermine any value of the *nullum crimen, nulla poena sine lege* principle.[122] This is the case since the criminal context, as 'described' in these cases, is fluid, with no possibility of objective specification; such 'description becomes a mockery, lacking any guaranteeing function, which, in the view of Manoledakis is prevalent in the protection of interests protected by law and the ideological function of criminal law.[123]

Such over-extension of the ambit of protected interests, in the framework of the judicialisation process, constitutes a further challenge to the fundamental principle

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[119] Moccia, *op. cit.*, p.141. On the different aspects of organised crime and the difficulties surrounding its definition, the following analysis is enlightening: 'it may be viewed as a set of different crimes, which, because of the context in which they occur, are perceived as *'organized crime'*. Certain crimes are aimed directly at 'organization' and 'combination' for criminal purposes: *association de malfaiteurs or associazione di tipo mafioso,* for example. Other crimes are typically committed by organized crime groups: trafficking in drugs, weapons, human beings, vehicles, nuclear material, art and cultural objects, for example, or bribery, subsidy fraud, money laundering, certain antitrust offences, fiscal offences, etc. Ohter offenses are 'common crimes' such as theft, murder, or kidnapping, which are sometimes utilized by organized crime, or committed pursuant to a criminal organization's interests.' C.L. Blakesley (1997), 'The Criminal Justice Systems Facing the Challenge of Organized Crime. Section II . The Special part' in *International Review of Penal Law*, vol.67, pp.581-582.

[120] *Ibid.*

[121] Manoledakis, op. cit., p.96.

[122] *Ibid.*

[123] Manoledakis, op. cit., p.20.

of *nullum crimen sine actu*. A clear example is the 'dangerousness' prominent in the conception of various types of the organised crime offence. Going further , Moccia observes that beyond the evanescence of interests protected by law that such laws entail, it is even more preoccupying that the emphasis is placed upon the simple agreement, even stable and organised, while 'it is the interests in question that in reality constitute the goal of the association and the object of the anticipated penal protection'.[124] In this manner, one witnesses the establishment of what Moccia calls 'suspicion offences' (*'délits de soupçon'*), which are marked by a strong symbolic connotation and to which the judge makes recourse when there is no proof of crimes committed by the association.[125] According to Moccia, however, 'these incriminations do not seem capable of realising this repressive finality, because the proof of the association (*for which there is no effective interest protected by law*) becomes extremely difficult to ascertain since the proof of the commission of other crimes (*délits*) is lacking'.[126]

II. THE CHALLENGE FOR CONSTITUTIONAL PRINCIPLES AND HUMAN RIGHTS

The juridification/judicialisation phenomenon is coupled with fundamental changes in policing in risk society. As noted above, the central element is that of knowledge; a multitude of information, to a great extent related to commonplace activities are increasingly communicated by 'responsibilised' private parties to an expanding network of traditional and newly created enforcement agencies. The quantity and quality of the information provided, which, in many instances is distantly, if at all, connected with the commission of an offence, along with the extension of law enforcement powers and the creation of new instances of policing, raise a series of issues of legitimacy, elevated in many instances to the constitutional level. The extensive doctrinal discussion in Germany, a country with

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[124] Moccia, *op. cit.*, p.140.
[125] What Moccia calls *'reati-scopo'*. *Ibid.*
[126] *Ibid.* Emphasis added.

traditional constitutional sensitivities, is illustrative of the debate, largely centred on the definition and content of security as a constitutional principle.

Justifications for the expansion of 'security' measures are founded to a great extent on considerations of internal peace, as one of the primary functions of the modern state. According to Pitschas:

> ' 'Security' constructs in that sense, that is as the protection of interests protected by law and integrity of individuals from interventions of other citizens, a decisive component of a social contract, founding the political power on which society is organised within the state and thus embodying a basic normative element (*Grundbestand*), which is given to guarantee the legal enjoyment of 'internal peace'.'[127]

Internal security is thus viewed as a fundamental constitutional value in need of protection[128]. Its scope encompasses state security as a constitutional peace and order power, and also the peoples security, both being considered as *inalienable (unverzichtbare)* constitutional values.[129] These values are 'in the same rank' as others, leading to the assertion that security as a constitutional principle is not directly capable of being subsumed.[130]

Following a similar line of argumentation, another German commentator, Joseph Isensee, asserts the existence of a 'the fundamental right to security'.[131] On the basis of Montesquieu's classical *locus* that 'political freedom consists in security or

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[127] *'Sicherheit' bildet in diesem Sinne, nämlich als Rechtsguter- und Integritätsschutz der einzelnen vor Beeintrachtigungen durch andere Bürger einen massgeblichen Bestandteil jenes Gesellschaftsvertrags, der die politische Herrschaft in der sich als Staat organisierenden Gesellschaft auf Recht grundet und hierbei einen Grundbestand an Normen verankert, der den 'Inneren Frieden' unter den Rechtsgenossen zu gewahrleisten aufgibt'*. R. Pitschas (1993), 'Innere Sicherheit und internationale Verbrechensbekampfung als Verantwortung des demokratischen Verfassungsstaates' in *Juristenzeitung*, 17.9.1993, p.857.

[128] *'Schutzgut'*

[129] Pitschas, *op. cit.*

[130] *Ibid.*

[131] J. Isensee (1983), *Das Grundrecht auf Sicherheit. Zu den Schutzpflichten des freiheitlichen Verfassungsstaates*, Walter de Gruyter, Berlin, New York.

in the opinion of being secure'[132], he begins from a similar theoretical premise as Pitschas, considering security and freedom as inextricably linked, deeming security as *'status positivus libertatis'*, protecting citizens from the other's attack.[133] This protection, which is viewed to emanate from fundamental rights,[134] is further analysed in a two-fold manner: Isensee links the state/rule of law concept of security with the police concept of 'public security' (*'öffentliche Sicherheit'*), adding that:

> 'both have meaning above all in their use in favour of the individual interests protected by law, that is on the fundamental protected interests. 'Public security', founded in policing, also entails the - beyond the individual (level) - interests of 'internal' security, that is the objective legal order, the institutions and organisations of the state and its overall sovereignty'.[135]

Following this extensive interpretation, security is further analysed as freedom from compulsion on the one hand, and freedom from fear on the other.[136] The analysis here is slightly different from Pitschas, who rejects the distinction between an objective state of security and an existing subjective feeling of insecurity, since 'security is no objective category' but is rather perceived through a communication process.[137] Isensee, however, commences with a distinction between fear and security, accepting that the *topos* is capable of manipulation, since fear is linked primarily with a feeling and an existential inner moment, with a pure subjectivity which is not associated with the rule of law principle.[138] He goes on to include in his model of security not fear *per se*, but the objective grounds for a justified fear

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[132] 'La liberté politique consiste dans la sûrété ou du moins dans l'opinion que l'on a de sa sûrété' *(De l' Ésprit des Lois, Livre XII, 2)*: Isensee, *op. cit.*, p.22.
[133] Isensee, *op. cit.*, p.21.
[134] Isensee, *op. cit.*, p.22.
[135] 'Beide stimmen überein in ihrer Anwendung auf die Individualrechtsguter, also auf die grundrechtlich geschützen Interessen. Die 'öffentliche Sicherheit', die den Polizeigesetzen zugrundeliegt, erfasst auch uberindividuelle Belange der 'inneren' Sicherheit, also die objective Rechtsordnung, die Einrichtungen und Veranstaltungen des Staates sowie der sonstigen Hoheitstrager'. Isensee, *op. cit.*, pp.22-23.
[136] Isensee, *op. cit.*, pp.24-25.
[137] Pitschas, *op. cit.*, p.859.
[138] Isensee, *op. cit.*, p.26.

translated into danger or its absence. [139] In this context, the writer elaborates a *fundamental right to security*, consisting in the *ensemble* of fundamental rights duties of protection and entailing not only negative, but also positive action.[140]

The perception of a legal right to security in this context causes a series of concerns, notably related to the theorisation and attempted definition of the concept of security *per se*. It is interesting to note that, in the same year as Isensee, in one of the first attempts to reconceptualise security in international relations, Buzan asserted the ambiguity of the term by stating that 'dictionary definitions give the flavour of this ambiguity with their reference to notions like being protected from danger, feeling safe, and being free from doubt. The referent threats (danger and doubt) are very vague, and the subjective feeling of safety has no necessary connection with *actually being safe'*.[141] Buzan then goes on to highlight the need 'to discuss security in relation to specific threats'. [142]

At the legal level, it is exactly this specificity that both Pitschas and Isensee fail to provide. Notwithstanding the latter's quest for an 'objective' theorisation of danger, his framework of analysis is devoid of any analytical tool aiding in the 'objectification' of the threat. Pitschas on the other hand, while emphasising the discursive process of securitisation, proceeds to a catch-all abstraction, by including any insecurity feeling as a factor justifying legal intervention. In both cases the determination of specific 'collective interests' to be protected, and the further specification of their content, is avoided, and even undermined, through the unqualified association of security with state organisation and state sovereignty. Furthermore, the accomodation of the analysis at the constitutional level to the

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[139] *Ibid.*

[140] On the *'Grundrecht auf Sicherheit'*, see Isensee, *op. cit.*, p.33 *et seq.* On developments in Germany and the role of the Constitutional Court, see P.J. Cullen (1997), *Crime and Policing in Germany in the 1990's*, The University of Birmingham, Institute for German Studies, Discussion Papers in German Studies, No. IGS 97/13, p.20.

[141] B.Buzan has already remarked this in the first edition of 'People, States and Fear': B. Buzan (1983), *People, States and Fear: the National Security Problem in International Relations*, Harvester Books, Brighton, p.19.

[142] *Ibid.*

individual and the state excludes the trickier question of security for the 'social fabric' and the issues of 'fidelity in society' it entails.

This ambiguity entails the danger of what Lisken calls 'the turn from law to security considerations'.[143] This phenomenon, according to Lisken, is particularly likely through *interpretation*, rather than through constitutional amendment.[144] Both Pitschas and Isensee provide interpretations which embody such potential. Balancing fundamental rights guarantees under an ambiguous, catch-all 'right to security', offers ample legitimacy for political - appelative- rather than rule of law-argumentative- positions.[145] Security appears as a 'symbolic notion',[146] transforming the protection of fundamental rights within its ambivalent logic. Cautious of this process, one is reminded of the words of Hassemer, calling for the promotion of 'the surpassed traditional understanding of fundamental rights that lie in the realm of internal security as defence rights against state encroachment, rather than being obstacles in normal police work'.[147]

5. THE EMERGENCE OF A TRANSNATIONAL SECURITY FIELD IN ORGANISED CRIME: NEW ACTORS AND GLOBAL MEASURES

I. GENERAL

Further challenges to an answer to the 'whose security' question are posed by changes in the conception of security actors. This redefinition is linked with what has been called the 'internationalisation' or 'globalisation' of crime'[148]. Offspring of a series of intrernational developments in technology and communication,

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[143] *'Wendung von Rechts-zum Sicherheitsdenken'*: H.Lisken (1994), ''Sicherheit' durch 'Kriminalitätsbekämpfung', in *Zeitschrift für Rechtspolitik*, 27.Jahre, Februar, p.50.
[144] *Ibid.* Emphasis added.
[145] *Ibid.*
[146] Albrecht, *op. cit.*, p.124.
[147] W.Hassemer (1993), 'Innere Sicherheit im Rechtstaat' in *Strafverteidiger*, vol.12/93, p.669.
[148] See for instance T.Sherman (1994), 'The Internationalisation of Crime and the World Community's Response' in *Action Against Transnational Criminality: Papers from the 1993 Oxford Conference on International and White Collar Crime*, London, p.1(10).; McDonald, *op. cit.*

increasing financial interdependence and mobility, the evolution of a 'global village' has been viewed as beneficial for criminal organisations, endowed now according to the United Nations with 'unprecedented opportunities'.[149] In the quest for effective control of such opportunities, the concept of *transnational crime* emerged. An early definitional attempt included the following two constitutive elements in the concept:

> '1. *The crossing of a border* either by people (criminals; fugitives or on the way to commit a crime; or victims-such as in the case of traffics in human beings); or by things (firearms, such as when terrorists put arms on a plane before takeoff; money techniques of money-laundering; objects used in the commission of a crime, such as drugs on carriers or in containers); or even by criminal will (computer fraud, when an order given from Country A is transmitted to Country B).
>
> 2. *International recognition of a crime*: at national level, according to the principle 'nullum crimen, nulla poena sine lege' (no offense, no sanction without law), an anti-social conduct can be considered as a crime only if there is a legal text providing for it; at international level, if the fact is considered a criminal offense by at least two states. This recognition may result from international conventions, extradition treaties or concordant national laws.'[150]

The introduction of the concept is linked with the 'securitisation' of transnational criminality which, as seen above, is largely perceived as a multifaceted security threat. In turn, these changes in the perceptions of security, within what has been described as a '*social space* transcending the internal/external, national/international distinction',[151] transform the 'security logic' permeating the phenomenon of transnational criminality, into an emerging *'transnational security logic'*.[152] In this manner, the eroded myth of 'sovereign crime control'[153] is

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[149] Williams and Savona, *op. cit.*, p.8 (also on the 'global village' terminology). On the globalisation factors, see also Williams, *op. cit.*; Sherman, *op. cit;*

[150] A.Bossard (1990), *Transnational Crime and Criminal Law*, The Office of International Criminal Justice, The University of Illinois at Chicago, p.5.

[151] *'espace social'*: D.Bigo (1996), *Polices en Réseaux, L' Expérience Européenne,* Presses des Sciences Politiques, Paris, p.49.

[152] W. de Lemos Capeller (1997), 'La Transnationalisation du Champ Pénal: Reflexions sur les Mutations du Crime et du Contrôle' in *Droit et Société*, vol.35, p.64. Emphasis added.

[153] Garland, 1996., p.448.

replaced by the internationalisation[154], or *transnationalisation of the penal field*:[155] consequently the state as sole guarantor of penal protection, is increasingly influenced by this transnational security logic, and gradually gives up its place to a series of international bodies that, as security actors, aim to achieve global standards in the measures adopted to counter the criminal threat. [156]

Assessing the emergence of a transnational penal field, Wanda de Lemos Capeller uses two interrelated concepts proposed by social theory, examining crime control strategies in the context of *'globalised localism'* on the one hand, and *'localised globalism'* on the other. [157] Using the example of France, she attributes to the 'localised globalism' strategy the following characteristics: 'the development of a legislation which, within the framework of the globalisation process, appears as an ensemble of *local policies* on the one hand; and, on the other hand, the *opening of France towards the transnationalisation of control'*.[158] While here it is still *the state* that remains a security actor, it is placed within the transnational realm, acting in accordance with its imperatives. In the case of France, numerous examples of legislative action are offered, regarding drug use and trafficking, and money laundering.[159] This process is linked with that of 'localised globalism', where a series of international, regional or *ad hoc* bodies assume, *in lieu* of the state, the role of security actors, aiming to produce a 'global' legislative and regulatory framework aiming to counter transnational criminality. In this manner, the state has to comply with 'international' standards and obligations.

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[154] Anderson *et al.*, *op. cit.*, p..159

[155] de Lemos Capeller, *op. cit.* Emphasis added.

[156] The evolution of money laundering counter-measures form within this *rationale*, 'a global strategy for a global problem': Williams and Savona, *op. cit.*, p.167.

[157] de Lemos Capeller, *op. cit.*, p.62, citing B. de Sousa Santos (1995), *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition,* Routledge, New York, London, pp. 265 *et seq.*

[158] de Lemos Capeller, *op. cit.,* p.69.

[159] de Lemos Capeller, *op. cit.,* pp.69-72.

Such developments have given rise to the development of what has been called an 'international criminal law', or 'transnational criminal law'.[160] Along with that, and in accordance with the developments in methods of the administration of knowledge and control, such criminal law standards have been accompanied by the birth of 'transnational policing'.[161] Both the domains of criminal law and policing are of high sensitivity. Farmer begins his book on 'crime and the genius of Scots law' as follows: 'the need to talk about and establish boundaries is perhaps stronger in relation to the criminal law than any other area of law. The field of criminal law marks itself out by its history of preoccupation with limits- of the law, of the sanction, of criminalisation. These images of space and landscape continue with descriptions of the contours of liability, the field of punishment, the frontiers of criminality, or the territory of the law'.[162] On the other hand, according to Sheptycki, 'policing is intimately bound up with the imposition of the nation-state system and the state is thus 'the most powerful reference point for our present understanding of the wider political relevance of policing institutions''.[163]

In view of such sensitivities, the imposition of 'global' standards to counter transnational crime, albeit with the state's participation in their formulation, encounters significant national barriers regarding their implementation. Along with issues related to national socio-economic particularities and diverging legal cultures, fundamental problems arise when posing the key question of 'whose security' at the transnational level. Is it possible to define 'global interests' protected by the establishment of transnational criminal offences? And, at a further

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[160] For a discussion on the emergence of the terms see R. S. Clark (1998), 'Countering Transnational and International Crime: Defining the Agenda', in P.J. Cullen and W.C. Gilmore (eds.), *Crime Sans Frontières: International and European Legal Approaches*, Edinburgh University Press, Edinburgh,

[161] From the abundant literature on the topic, see J.W.E. Sheptycki (1995), 'Transnational Policing and the Makings of a Postmodern State' in *British Journal of Criminology*, vol.35, no.4, p.613. Note also the recent analysis of B.Hebenton and T.Thomas (1998), 'Transnational Policing Networks' in *International Journal of Risk, Security and Crime Prevention*, vol.3, no.2, p.99.

[162] L. Farmer (1997), *Criminal law, Tradition and Legal Order. Crime and the Genius of Scots Law, 1747 to the Present*, Cambridge University Press, p.1.

[163] Sheptycki, *op. cit.*, p.615, citing N. Walker (1994), 'European Integration and European Policing: A Complex Relationship' in M. Anderson and M. den Boer (eds.), *Policing Across Transnational Boundaries*, Pinter, London.

stage, is there a transnational framework of constitutional or fundamental rights, balancing the increasingly invasive measures against transnational criminality? In view of its continuous integration process, these questions become more acute in the case of the supranational framework of the European Union.

II. THE EUROPEAN UNION AS A SECURITY ACTOR

On 7 of March 1991, Jacques Delors, then President of the European Commission, delivered the Alastair Buchan memorial Lecture in London, on the theme of European integration and security.[164] Following an expansive conceptualisation of the notion, Delors spoke of security as 'an all-embracing concept'[165] and as 'a problem of society',[166] including in its realm issues such as the environment and migratory flows. Going further, Delors focused specifically on the Community dynamic of security, linking it with the developing process of European integration and the establishment of an internal market. He noted:

> 'One thing leads to another. This has been a feature of the Community, which is constantly being taken into new areas. One of these new areas is closely linked to the overall concept of security. I am referring, of course, to the consequences of free movement for individuals and the need for joint action, or at the very least close co-ordination, to combat the various threats to personal security: organized crime, drug trafficking, terrorism...Political initiatives in this security-related area are another expression of solidarity, a *leitmotif* of the European pact'. [167]

These concerns were reflected in the Maastricht Treaty on the European Union, whose so-called 'third pillar' (Title VI) contained a series of provisions on cooperation in the fields of Justice and Home Affairs. The cornerstone of this framework, Article K.1, provided that 'for the purposes of achieving the objectives of the Union, in particular the free movement of persons' Member States shall

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[164] J. Delors (1991), 'European Integration and Security' in *Survival*, vol.XXXIII, pp.99 -110.
[165] Delors, *op. cit.*, p.100.
[166] Delors, *op. cit.*, p.101.
[167] Delors, *op. cit.*, p.103.

regard the following areas as *matters of common interest*: asylum policy; rules on the crossing of the external borders of the Member States and the exercise of controls thereon; immigration policy and policy regarding nationals of third countries; combating drug addiction; combating fraud on an international scale; judicial cooperation in civil matters; judicial cooperation in criminal matters; customs cooperation; and police cooperation for the purposes of *preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime*, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol).

Notwithstanding the fact that the third pillar provisions fall outside European Community competence, establishing co-operation at the intergovernmental rather than at the supranational level directly binding the Member States[168], the importance of the introduction of such provisions in the EU framework is pivotal, as the first constitutional expression of the transnational security logic at the EU level. The European Union, as a supranational security actor, defines its security threats, stretching them to include matters of common interest as diverse as asylum, immigration, and forms of international criminality, along with police cooperation to counter them. Such formulation has been repeatedly attacked as leading to the construction of a *'security continuum'*,[169] 'linking terrorism, drugs, organised crime, mafia,..., illegal immigrants, immigration and asylum seekers, *transferring the illegitimacy* of the former to the latter'.[170]

From a legal perspective, the choice of the third pillar mechanisms has also been criticised. Bearing in mind the controversy regarding the EC criminal law

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[168] On an analysis of the legal character of the Maastricht Third Pillar, see P.C. Muller-Graf (1994), 'The Legal Bases of the Third Pillar and its Position in the Framework of the Union Treaty' in *Common Market Law Review*, vol.31, pp.493-510.

[169] *'continuum de menaces'*: Bigo, *op. cit.*, p.263. On the subsequent use of the term see Anderson *et al., op. cit.*, pp.164 et seq.; M. den Boer (1996), 'The Hermeneutics of Justice and Home Affairs Cooperation' in F. Tulkens and H. D. Bosly (dir.) *La Justice Pénale et l'Europe*, Bruylant, Brussels, p.321, speaking about a 'process of amalgamation', parallelled by 'a process of disconnection and fragmentation'.

[170] *Ibid.*

competence, nowhere expressly mentioned in the EC Treaty, and the ambivalence surrounding the protection of human rights at the EC level, the choice of a level of co-operation with significant consequences for these matters but without clearly demarcated guarantees of legitimacy and accountability at the EC/EU level has caused a series of reactions; the debate lies in ascertaining whether the creation of a European 'security space' is accompanied by a sufficient degree of integration, allowing the European Union to provide analogous guarantees to the state at the legal level. A clear example is the creation of Europol, whose competences, limits and control remain a matter of controversy.[171]

Notwithstanding such controversies, the years following the entry into force of the Maastricht Treaty witnessed the adoption of a series of far-reaching third pillar measures. In the context of organised crime, a pivotal legal instrument adopted under Title VI of the Treaty is the Action Plan to Combat Organised Crime,[172] which contains a series of Recommendations for a wide range of measures to be adopted by member states under tight deadlines. The adoption of such measures was deemed necessary in order to combat organised crime, which, in accordance with prior international policy discourses, is perceived as a multifaceted threat. In this spirit, the introduction of the Action Plan reads as follows:

> 'Organized crime is increasingly becoming a threat to society as we know it and want to preserve it. Criminal behaviour no longer is the domain of individuals only, but also of organizations that pervade the various structures of civil society, and indeed society as a whole. Crime is increasingly organizing itself across national borders, also taking advantage of the free movement of goods, capital, services and persons. Technological innovations such as Internet and electronic banking turn out to be extremely convenient vehicles either for committing crimes or for transferring the resulting profits into seemingly licit activities. Fraud and corruption take on massive proportions, defrauding citizens and civic institutions alike'.

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[171] On issues related to the lack of democratic control in Europol, see *inter alia* A. H. Klip (1997), 'Europol, Who is Watching You?' in H. Meijers *et al.*, *Democracy, Migrants and Police in the European Union: the 1996 IGC and Beyond*, FORUM, Institute for Multi-cultural Dedelopment, Utrecht, p.61.

[172] OJ C251, 15.8.1997, p.1.

The adoption of measures to counter this threat was deemed to be necessary especially in order to achieve the objective of the European Union as an area of 'freedom, security and justice'.[173] This has been one of the primary objectives of the Treaty of Amsterdam, which crystallised the evolution of the European Union as a security community. Security has expressly been constitutionalised in the EU framework, constituting an *objective* for the European Union. [174] This development has been accompanied by structural rearrangements within the Treaty: the Maastricht third pillar has been decoupled, with a series of matters such as immigration and asylum entering the Community pillar , whose new Title IIIa on 'visas, asylum, immigration and other policies related to the free movement of persons' also contains a provision empowering the Council to adopt 'measures in the field of police and judicial co-operation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on the European Union' (Article 73i(e)); on the other hand, the Amsterdam third pillar has been enriched *inter alia* by the inclusion within its ambit of wide provisions on forms of organised crime and the 'approximation, where necessary, of rules on criminal matters in the Member States' (Article 29 *in fine* (ex K.1)); the extension of police co-operation to 'operational co-operation between the competent authorities', and matters as specific as 'the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement agencies of reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data' (Article 30 (a), (b) (ex K.2)); and the adoption of a new legal instrument, framework decisions, 'for the purpose of approximation of the laws and regulations of the Member States (Article 34 (2) (b) (ex K.6)).

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[173] *Ibid.*

[174] H. Labayle (1997), 'Un Espace de Liberté, de Securité et de Justice' in *Revue Trimestrielle de Droit Européen*, vol.33, no.4, p.820 *et seq.*

The link between measures against transnational organised crime and the evolution of the European Union as an area of security was reflected in the clearest manner in the 1998 Vienna Action Plan[175] and, very recently, in the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999.[176] Paragraph 40 of the Conclusions calls for a 'Unionwide fight against crime' and reads as follows:

> 'The European Council is deeply committed to reinforcing the fight against serious organised and transnational crime. The high level of safety in the area of freedom, security and justice presupposes an efficient and comprehensive approach in the fight against all forms of crime. A balanced development of unionwide measures against crime should be achieved while protecting the freedom and legal rights of individuals and economic operators'.

What is most significant in such developments is that the concept of security appears as a legitimate objective in both the EC and EU framework, possibly offering to the latter the legitimacy required as a supranational security actor formulating and sustaining a European right to security. However, there are plenty of issues that remain contested: for instance, it is always security forming an exception to the Treaty provisions: Article 73l of the 'free movement' Title, provides that the latter 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'; Moreover, the role of EC institutions such as the European Court of Justice in controlling the 'security' provisions remains, if not limited, contested, and issues of legitimacy and accountability remain open, especially in view of the constitutionalisation of terms as vague as 'security' and, in spite of the annex to the protocol attempting to define it, the

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[175] *Action Plan on the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice*, text adopted by the Justice and Home Affairs Council of 3 December 1998, OJ C19, 23.1.1999, p.1.

[176] Text downloaded from: http://europa.eu.int/off/conclu/oct99/oct99_en.htm

'Schengen *acquis*'.[177] In this manner, the extent the European Union can replace the state in answering the 'whose security' question remains open As Neil Walker notes:

> ' the fact that Europe is increasingly becoming a referent object of security, not only in an internal sense but also in an external sense-as an actor on the world stage-suggests that we are beginning to invest the idea of Europe with many of the characteristics and attributes previously attributed to the state. However, this is uncharted territory and the next stage of the journey is not clear'.[178]

6. MONEY LAUNDERING COUNTER-MEASURES AS SECURITY MEASURES : THE RELEVANCE OF THE DISCUSSION FOR THE DEVELOPMENT OF AN EU ANTI-MONEY LAUNDERING FRAMEWORK

It is submitted that the analysis of the reconceptualisation of security at the global level can serve as an analytical framework in whose context the evolution of money laundering counter-measures can be placed and assessed. Following the schematic structure of the aforementioned discussion, the analysis will focus on:
-. the emergence of the money laundering phenomenon as a *threat.* After analysing the nature of the phenomenon, emphasis will be placed on policy discourses viewing money laundering as a multi-level threat, closely connected, and at times

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[177] On a first analysis of the complexities of the Amsterdam treaty in the matter, see M. den Boer (1997), 'Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity Despite Communautarization' in *Maastricht Journal of European and Comparative Law*, vol.4, pp.310-316; M. den Boer,.(1997) 'Step by Step Progress: An Update on the Free Movement of Persons and Internal Security' in *EIPASCOPE,* pp.8-11; N.Walker (1998), 'Current Developments: EC Law-Justice and Home Affairs' in *International and Comparative Law Quarterly*, vol.47, no.1, pp.231-238; Labayle, *op. cit.*; On a first overview of the issues related to the incorporation of the Schengen *acquis* to the Amsterdam Treaty, see J. Monar (1997), 'Schengen and Flexibility in the Treaty of Amsterdam: Opportunities and Risks of Differentiated Integration in EU Justice and Home Affairs' in M. den Boer (ed.), *Schengen, Judicial Cooperation and Policy Coordination*, European Institute of Public Administration, Maastricht, pp.9-28; D. Curtin (1997), 'The Schengen Protocol: Attractive Model or Poisoned Chalice?' in *Statewatch*, vol.7, no.3, pp.18-19; and J.J.E. Schutte (1998), 'The Incorporation of the Schengen *Acquis* in the European Union' in Cullen and Gilmore, *op. cit.*, pp.124-132.

[178] N. Walker (1998), 'European Policing and the Politics of Regulation' in Cullen and Gilmore, *op. cit.*, p.141.

identified, with that of transnational criminality. The particular characteristics of the money laundering process will be examined, in order to cast light on the validity of the threat assessment, with emphasis placed on the tenacity of its link with actual transnational criminal activities.

-. the emergence of *money laundering counter-measures per se.* As a novel, constantly developing phenomenon, money laundering countermeasures will be examined as an answer to the threat discourse. The aforementioned analysis will be accommodated, as the anti- money laundering framework is characterised by:

a. the creation of a new, money laundering criminal offence. The nature of the offence as a derivative one will be examined in relation to traditional criminal law principles.

b. the adoption of a series of 'responsibilisation' measures, calling at citizens to co-operate with the authorities in the fight against crime.

c. the emergence of a multifaceted policing framework. As knowledge of every day transactions is fundamental in the fight against money laundering, citizens have to co-operate with an increasing number of policing institutions. Apart from traditional law enforcement agencies, many of them are new, ad hoc agencies created to aid the fight against money laundering.

The focus of the analysis will be the *European Union anti-money laundering framework.* Placing the European Union within the framework of the multiple international, regional and ad hoc *global actors* in the securitisation of the money laundering phenomenon, the emergence of an EU anti-money laundering framework will be examined in the light of the challenges it poses to fundamental legal principles, notably principles of criminal law and human rights. Following the structure set out in this chapter, the analysis will focus respectively on:

-. the 'securitisation' of money laundering and the emergence of countermeasures in the international arena.

-. the influence of these developments on the European Union policies, with emphasis on the emergence of the EC money laundering directive, and its analysis, particularly in relation to other international initiatives; also on the Justice and

Home Affairs provisions related to the policing aspect of money laundering. Specific issues within the countermeasures, related to:

a. money laundering as a criminal offence in the European Community and the European Union

b. EC-wide prevention strategies, focusing on the responsibilisation of citizens

c. the policing aspect, examining the administration of knowledge both at national and EU level.

-. the 'balancing act' between money laundering counter-measures and the safeguarding of the legal principles they challenge. In this analysis the position of the European Union as a security actor, imposing emergency measures to defend *inter alia* itself as a referent object plays a central part. Money laundering counter-measures will be assessed in the light of the stage of European integration, in order to assert whether the legitimacy of the European Union in imposing security standards is accompanied by the power to protect fundamental legal principles and rights effectively. This will lead to a conclusion on the position of money laundering counter-measures as a new paradigm of governance in the evolution of the European Union as a 'security community'.

2

The securitisation of money laundering: the phenomenon, the threat and the evolution of counter-measures at the international level

1. THE PHENOMENON

> 'It is like a stone thrown into a pond. As it begins to sink, the water ripples and for a few moments, you can still find the spot where the stone hit. But, as the stone sinks deeper, the ripples fade. By the time the stone reaches the bottom, any traces of it are long gone and the stone itself may be impossible to find. That's exactly what happens to laundered money'.[1]

Robinson's eloquent metaphor serves to illustrate the evolution of the money laundering phenomenon. The route of laundered money from the surface of the financial system to its depths, where all criminal traces are lost, is accomplished by a series of steps. As has been eloquently noted, 'money laundering is *a process*, often a highly complex one, rather than a single act'.[2] This process consists of concealing the criminal origin of assets and investments or the illegal nature of a financial transaction.[3] It can be of varying degrees of complexity, depending on variables such as: the degree of complexity of the organisational structure of the criminal organisation; the type of criminal activities in the illegal markets and their infiltration into legitimate industries; and the volume of the income produced and

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[1] J. Robinson (1995), *The Laundrymen*, Pocketbooks, London, p.30.

[2] W.C.Gilmore (1999), *Dirty Money: The Evolution of Money Laundering Counter-Measures*, 2nd edition, Council of Europe Publishing, p.29. Emphasis added.

[3] E.U.Savona and M.A.De Feo (1997), 'International Money Laundering Trends and Prevention/Control Policies' in E.U.Savona, *Responding to Money Laundering. International Perspectives*, Harwood Academic Publishers, Australia, Canada, China, France, Germany, India,

the opportunities provided by the collusive relationships between criminal organisations and administrative, banking and financial institutions.[4]

On the basis of these parameters, and the inherent imagery in the money laundering terminology, Savona has categorised the various money laundering typologies in the following manner:

-. *Hand Wash.* When a criminal organisation uses the money (generally a small amount) to buy goods and services for the organisations.
-. *'Family' Washing Machine.* When each criminal organisation or family launders its money according to 'family' goals and collusion with banks or financial institutions. 'Washing programs' can consist of the short cycle, such as opening a deposit account in a bank in the name of a given person and depositing the money there; the long cycle, which involves terms such as prewash, wash, rinse and drying to describe the different passages from cleaning the money to its investment in legitimate activities.
-. *'Condominium' Washing Machine.* When several 'families', belonging to the same criminal syndicate, such as the Mafia, organise a laundering enterprise with the complicity of someone in a bank or financial institution.
-. *Launderette.* When a criminal organisation offers criminals and criminal syndicates a money laundering service with different cycles: the short cycle for cleaning the money only, or the long cycle which includes all the activities from laundering to investment.[5]

This analysis is further systematised by Savona and De Feo, who recently offered a distinction between money laundering schemes, methods and mechanisms. Using

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Japan, Luxembourg, Malaysia, The Netherlands, Russia, Singapore, Switzerland, Thailand, United Kingdom, p.10.

[4] E.U.Savona (1993), 'Mafia Money Laundering versus Italian Legislation', in *European Journal of Criminal Policy and Research*, vol.1, no.3, p.35.

[5] *Ibid.* For a detailed and constantly updated analysis of money laundering typologies, see the relevant reports by the Financial Action Task Force, which can be downloaded from www.oecd.org/fatf/

the case of 'smurfing', the authors refer to *the scheme* being the plan to launder the proceeds of crime and structure the transaction; *the method* being smurfing;[6] and *the mechanisms* being the banks and brokerage houses.[7] Once more the variability of the process is stressed, with the authors noting that 'a scheme could be simple, as in the example, or more complex when more and different methods and mechanisms are involved, and an overall conception or practice of combining or selecting schemes according to organizational goals could properly be called a money laundering strategy'.[8] The variability in the complexity of money laundering schemes has been clearly illustrated by Beare, who has classified them under the following headings:

-. *Simple-Limited.* These schemes are limited to straightforward financial manipulations accommodating a relatively small amount of illicit proceeds, and are marked thus by a 'ceiling' or a limit on the laundering potential.

-. *Simple-Unlimited.* These schemes resemble the 'simple' ones of the former category in the sense that the manipulation is straightforward and involves few transactions. They are called 'unlimited' because the ceiling is very high and becomes even more 'unlimited' by 'the ambiguous, specialized and big-budgeted businesses' used.

-. *Serial-Domestic.* These schemes function through numerous financial transactions, with the potential to create 'an impossible paper trail'. Launderers take advantage of loopholes in the regulatory and law enforcement system by using a number of different transactions and professions.

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[6] The term 'smurfing' was born in the United States, to describe the exploitation by money launderers of the 1970 Bank Secrecy Act, which required financial institutions to file a Currency Transaction Report for transactions exceeding $10,000. To avoid the report, it has been noted that 'a single currency transaction would often be structured into multiple transactions of less than $10,000 each', with individuals known as 'smurfs' providing the structuring service by engaging in multiple banking transactions of less than this sum. J.Gurulé (1995), 'The Money laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?' in *American Criminal Law Review*, vol.32, p.825.

[7] Savona and De Feo, *op. cit.*, p.22.

[8] *Ibid.*

-. *Serial-International.* In the most sophisticated money laundering scheme, the aforementioned network of transactions is executed in more than one jurisdiction. Involving large amounts of illicit proceeds, these laundering schemes may use offshore jurisdictions, shell corporations, legitimate businesses, smuggling, wire transfers, loan scams or invoice manipulations.[9]

The complexity and variability of the money laundering phenomenon is captured by its classical conception as a series of stages, seen either as a continuum or alone.[10] The process can be epitomised in a classical three -stage process, described as such in leading academic works[11] and adopted by the Financial Action Task Force[12] and recent United Nations documents.[13] The stages are distinguished as follows:

-. *Placement.* Where cash derived directly from criminal activity (e.g. from sales of drugs) is first placed either in a financial institution or used to purchase an asset. Principal methods used in this stage, prior or after the enactment of anti-money laundering legislation, are:

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[9] M.E. Beare (1996), *Criminal Conspiracies. Organized Crime in Canada*, Nelson Canada, Toronto, Albany, Bonn, Boston, Cincinnati, Detroit, London, Madrid, Melbourne, Mexico City, New York, Pacific Grove, Paris, San Francisco, Singapore, Tokyo, Washington, pp.102-104.

[10] Savona and De Feo, *op. cit.*, p.23.

[11] See Gilmore, *op. cit.*, p.29, referring to J.Drage, (1992), 'Countering Money Laundering', Bank of England Quarterly Bulletin, November, p.420. The analysis of the stages, prior to the methods, is based on this. Also Savona and De Feo, *op. cit.*, pp.22-28. The same stages approach, albeit with different titles, is adopted by Hinterseer, distinguishing between the three stages of sorting and refining, laundering and reintegration. K. Hinterseer (1997), 'Laundering and Tracing of Assets', in B. Rider (ed.), *International Tracing of Assets*, CCH Editions, Bicester, pp.13-16. A recent study by the United Nations puts forward a similar, albeit differentiated view, which perceives money laundering as a three-stage process requiring: firstly, moving the funds from direct association with the crime; secondly, disguising the trail to foil pursuit; and, thirdly, making the money available to the criminal once again with its occupational and geographic origins hidden from view. United Nations, Office for Drug Control and Crime Prevention (1998), *Financial Havens, Banking Secrecy and Money-Laundering,* New York, p.4.

[12] The Financial Action Task Force Report of 6.2.1990 refers to the following key stages for the detection of money laundering operations: where cash enters into the domestic financial system, either formally or informally; where it is sent abroad to be integrated into the financial systems of regulatory havens; and where it is repatriated in the form of transfers of legitimate appearance. Text reproduced in W.C. Gilmore (ed.) (1992), *International Efforts to Combat Money Laundering*, Grotius Publications Ltd., Cambridge.

i. Physical disposal of bulk cash proceeds - because large volumes of cash may draw attention to their illegal source and carry a continuous risk of theft or seizure, criminals are motivated to exchange small denomination bills for larger bills, to deposit cash and buy financial instruments or otherwise dispose of bulk cash promptly.

ii. Structuring/'Smurfing' - of cash transactions (deposits, monetary instrument purchases), to evade the common regulatory requirement that transactions which exceed a certain amount be recorded and sometimes reported.

iii. Bank complicity - money laundering is facilitated when bank personnel are corrupted, intimidated or controlled.

iv. Misuse of exemptions - the unsupervised unilateral ability of a financial institution to exempt itself or its customer from a reporting or recording regimen can offer money launderers a way in which to avoid an audit trail of their cash transactions.

v. Commingling of licit and illicit funds - commingling of funds and establishing front companies is a way to take advantage of these circumstances by obscuring illicit proceeds in a forest of licit transactions (commingling) or masking them with the appearance of legitimate receipts of a largely cash business activity (front companies).

vi. Assets purchased with cash - large scale purchases can support a luxurious life style; change the form of the proceeds from conspicuous bulk cash to some equally valuable but less conspicuous form; or obtain major assets which will be used to further the criminal enterprise.

vii. Currency smuggling - the cross-border smuggling of currency and monetary instruments by various methods accomplishes the desired physical transfer without leaving an audit trail.[14]

-. *Layering*. The stage at which there is the first attempt at concealment or disguise of the source of the ownership of the funds. This is achieved by the creation of one

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[13] See the United Nations International Drug Control Programme Fact Sheet No.5 for the General Assembly Special Session on the World Drug Problem, New York, 8-10 June 1998.

or more layers of financial transactions designed to interrupt any audit trail.[15] Principal methods are:

i. The creation of a false paper trail - the intentional production of false documentary evidence to disguise the true source, ownership, location, purpose of or control over the funds.

ii. Cash converted into monetary instruments - once illicit proceeds have been placed into a bank or a non-bank financial institution, they can then be converted into monetary instruments such as traveller's checks, letters of credit, money orders, cashiers checks, bonds or stocks. Conversion into monetary instruments allows the proceeds to be more readily transported out of the country without detection, to be deposited into other domestic financial institution accounts, pledged for loans, etc.

iii. Tangible assets purchased with cash and converted - two benefits offset transaction costs: the identity of the parties may be obscured by untraceable transactions, and the assets become difficult to locate and seize.

iv. Electronic funds (or wire) transfers - possibly the most cost effective layering method available to money launderers. They offer criminals speed, distance, minimal audit trail, and virtual anonymity amid the enormous daily volume of electronic fund transfers, all at minimal cost.[16]

-. *Integration.* The stage at which the money is integrated into the legitimate economic and financial system and is assimilated with all other assets in the system. Principal methods are:

i. Real estate transactions - property can be bought by a shell corporation using illicit proceeds. The property can then be sold and the proceeds appear as legitimate sales proceeds. A reduced price can be declared and partial payment made in cash to the seller, guaranteeing a paper profit when the property is resold at the market value. Inflated prices can be established by a series of

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[14] Savona and De Feo, *op. cit.*, pp.23-24.
[15] Savona and De Feo, *op. cit.*, p.26.
[16] Savona and De Feo, *op. cit.*, pp.26-27.

trades, enabling the last seller to show a legitimate source for a substantial, although fictitious, profit, or providing justification for inflated loan transactions.

ii. Front companies and sham loans - in this way the owner can pay his foreign laundering subsidiary interest on the loan and deduct it as a business expense, thereby reducing his tax liability.

iii. Foreign bank complicity - money laundering using accomplice foreign banks represents a higher order of criminal sophistication and presents a very difficult problem both at the technical and political levels. Such a bank can conceal many incriminating details relating to persons and transactions and provide sham loans secured by criminal proceeds, while guaranteeing immunity from law enforcement scrutiny due to the protective banking laws and regulations of another sovereign government.

iv. False import/export invoicing - ficticious transactions, overevaluation of entry documents and/or the overevaluation of exports serve to justify funds transfers involving criminal proceeds.[17]

While there are instances where all three stages are clearly discernible, the variability and complexity of the money laundering process can result in cases where only a number of these stages occurs, or they occur simultaneously or overlap.[18] This has led to a number of alternative models to the three-stage one. A systematic overview is provided by Katharina Oswald, who groups the classical model with:

-. The two-phases model, distinguishing between: money laundering of first degree, concerning the laundering of money stemming directly from illegal acts; and second degree laundering, indicating mid- and long term operations, through

[17] Savona and De Feo, *op. cit.*, pp.27-28. For a series of examples of money laundering schemes, methods and mechanisms, see *ibid.*, pp.28-31.
[18] Gilmore, *op.cit.*, p.30.

which the laundered money appears as legal income and is restructured in the legitimate financial system (recycling);

-. The 'circulation' model, based on the cycle of water and divided into eleven stages;[19]

-. The four-sector model, in which each sector contains a refinement process; and

-. The destination/teleological model, based on the diverse money laundering targets (e.g. integration, investment, tax evasion, financing of organised crime).[20]

Notwithstanding the plurality in money laundering conceptualisations, it ought to be emphasised that in any type or stage of the money laundering process, the goal remains one: to conceal the true ownership and origin of criminal proceeds and to change their form by constantly maintaining control.[21] The element of concealment or disguise is integral to the conceptualisation of the money laundering phenomenon, and essential to distinguish it from the simple hiding of illicit proceeds.[22] This should be born in mind in attempting to assess the development of strategies leading to the evolution of money laundering counter-measures.

2. THE STRATEGY

[19] Schematically the cycle goes as follows: Rain (insertion of cash) - insertion of water in the soil (first wash) - creation of undercurrent waters (creation of reserves) - creation of uderground seas through drainage (preparation and transportation abroad) -recollection in underground seas (preparation for legitimation) - water pumping station (entrance to the legitimate financial system) - biological cleansing installations (second wash) - consumption/use (transportation and investment) - evaporation (legal re-introduction to the country of origin) - new rain (new insertion of cash from criminal activities). Model put forward by A. Zund (1990), 'Geldwäscherei: Motiven - Formen - Abwehr' in *Der Schweizer Treuhander*, vol. 9, as described in S. A. Katsios (1998), *Money Laundering. The Geopolitics of the International Credit and Financial System: The Phenomenon of Legalisation of Proceeds from Criminal Activities* (in Greek), Sakkoulas editions, Thessaloniki, p.78, note 5. Katsios distinguishes between the 'cycles' models, the Angloamerican 'stages' models, and the teleological/destination model (pp.77-87).

[20] K. Oswald (1997), *Die Implementation gesetzlicher Massnahmen zur Bekämpfung der Geldwäsche in der Bundesrepublik Deutschland. Eine empirische Untersuchung des para.261 StGB i.V.m. dem Geldwäschegesetz,* edition Iuscrim, Freiburg i. Br. See pp. 8-15 on criminological definitions of money laundering and further references.

[21] Gilmore, *op. cit.*

[22] See also United Nations, Office for Drug Control and Crime Prevention, *op. cit.*

> 'From the point of view of the criminal, it is no use making a large profit out of criminal activity if that profit cannot be put to use...Putting the proceeds to use is not as simple as it may sound. Although a proportion of the proceeds of crime will be kept as capital for further criminal ventures, the sophisticated offender will wish to use the rest for other purposes...If this is to be done without running an unacceptable risk of detection, the money which represents the proceeds of the original crime must be 'laundered'; put into a state in which it appears to have an entirely respectable provenance'.[23]

This much-cited statement by McClean epitomises the rationale underlying the evolution of money laundering counter-measures: not only is money laundering deemed as sustaining a major incentive of criminal activity, i.e. the accumulation of profit, but also, through this accumulation, it helps sustain the very existence of criminal organisations. Extending this point, such a profit-making process, largely accomplished through the channels of the financial system, endangers the very function of the system, through its infiltration with 'dirty' money. In view of such perils, money laundering counter-measures were deemed necessary to pursue a two-fold goal:

-. attacking criminal activities and disrupting criminal organisations; and

-. defending the transparency of the economic/financial system.[24]

The first goal, an active one,[25] seeks, according to Savona and De Feo, 'to discourage criminal activities by increasing 'law enforcement risk', a comprehensive term meaning both the risk of being arrested and convicted and the risk that the proceeds of crime will be forfeited'.[26] While the authors consider the

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[23] J.D.McClean (1992), *International Judicial Assistance*, Oxford University Press, p.184, cited in Gilmore, *op. cit.*, p.27. Also in W.C.Gilmore (1993), 'Money Laundering:The International Aspect' in H. MacQueen (ed.), *Money Laundering*, Hume Papers on Public Policy, Edinburgh University Press, Edinburgh, p.1.

[24] E.Savona (1996), 'Money Laundering, the Developed Countries and Drug Control: The New Agenda' in N.Dorn, J.Jepsen and E.Savona (eds.), *European Drug Policies and Enforcement*, Macmillan, London, p.217. Savona and De Feo, *op. cit.*, pp.46-47.

[25] Savona, *op. cit.*

[26] Savona and De Feo, *op. cit.*, p.46. See also Savona, *op. cit.* In a similar manner a note by the United Nations Secretary General states that 'following the money trail could constitute a more effective and efficient alternative' in the fight against organised crime,as 'money -laundering investigations and the confiscation of proceeds from criminal activities undermine the ability of a criminal organization to perform its main task, the production of wealth'. United Nations, Economic

apprehension risk more easily controllable by criminals, they place emphasis on forfeiture risk, which is viewed as a 'less easily managed threat to the ultimate organizational motivation, the criminal proceeds themselves'.[27] They go on by asserting that 'making it more difficult for criminals to keep the proceeds of their crime, and making the enjoyment of those proceeds more dangerous, provide a classic economic disincentive to incurring the apprehension risk necessary to generate those proceeds'.[28]

The second goal is a defensive one.[29] Domestic and international financial systems need to be defended from being 'polluted' by the flow of 'dirty' money. Not only is criminal wealth deemed to create unfair competitive advantages over legitimate investors 'whose money has been earned at a lower profit margin than is possible in illegal enterprises and on which taxes must be paid',[30] but criminal money is viewed as creating an additional risk to political and economic systems through corruption.[31]

Such theorisation of the anti- money laundering strategy entails important consequences regarding the view of money laundering as a two-fold threat in the emerging transnational security landscape. One imperative of money laundering confrontation is connected with 'pure' criminal policy justifications, with the fight against money laundering being equated with the fight against transnational organised crime: not only are money laundering counter-measures intended to increase the law enforcement risk of criminals, but they also serve to provide a

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and Social Council, *Strengthening Existing International Cooperation in Crime Prevention and Criminal Justice, including Technical Cooperation in Developing Countries, with Special Emphasis in Combating Organized Crime*, Note by the Secretary-General, Addendum: Money Laundering and Associated Issues: The Need for International Cooperation, DOC. E/CN.15/1992/4/Add.5, 23 March 1992, p.3.

[27] Savona and De Feo, *op. cit.*, p.47.

[28] *Ibid.* In a negative formulation, the minimisation of risk is deemed as one of the launderers' objectives. See M.-C. Dupuis (1998), *Finance Criminelle. Comment le Crime Organisé Blanchit l'Argent Sale*, Presses Universitaires de France, Paris, pp.3-4.

[29] *Ibid.* See also Savona, *op. cit.*

[30] Savona and De Feo, *op. cit.*

[31] *Ibid.* Also Savona, *op. cit.*, p.218.

major disincentive for the expansion of transnational organised crime, by depriving criminals of their profits. In this continuum, the thread linking money laundering counter-measures with the variety and breadth of referent objects under the perceived threat of transnational organised crime - ranging form state stability and sovereignty to the social fabric *per se*[32]- remains highly contested, with the following questions being brought to the fore: is money laundering *per se* to be equated as a threat with that of transnational organised crime? Or is it rather to be considered as a facilitating factor for criminals, with their link being further distanced?[33] In approaching these issues, it is essential to place emphasis on the official policy discourses on the adoption of money laundering counter-measures, marked by the use of an abstract, catch-all vocabulary projecting money laundering as a security issue.

Such discourses also emphasise the threat of money laundering for the integrity and 'cleanliness' of the financial system. In this case, the threat is specified and analysed within a causal link between the flow of 'dirty' money and the malfunctioning of the financial system. This perception is relatively novel, and still highly contested.[34] Even more novel is its transliteration into legal and regulatory

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[32] See chapter 1.

[33] On the link between money laundering and harm to society in the context of RICO, the U.S. statute against organised crime, see the thought-provoking analysis of G.E.Lynch (1987), 'RICO: The Crime of Being Criminal, Parts I and II', in *Columbia Law Review*, vol.87, no.4, pp.689-690.

[34] The view of Lynch is interesting here. He argues that 'putting aside for a moment the acquisition of a business interest through direct criminal action, the act of acquisition is morally neutral, or even beneficial - 'black money' is fungible with the ordinary green stuff with respect to its economic function as a source of capital for socially productive businesses'. Lynch, *op. cit.*, p.689. It is interesting to note here that a definitive view on the macroeconomic implications of money laundering is not yet substantiated. In its recent report, the Commission of the European Communities, answering a relevant question by the European Parliament, referred to two papers of the International Monetary Fund, i.e. 'Money Laundering and the International Financial System', by Vito Tanzi, Working paper No 96/55, and 'Macroeconomic Implications of Money Laundering' by Peter J. Quirk, Working Paper No 96/66. The Commission further noted that in its presentation to the FATF Plenary, the IMF summarised the potential macroeconomic consequences of money laundering as follows: changes in the demand for money that seem unrelated to measured changes in fundamentals; volatility in exchange rates and interest rates due to unanticipated cross-border transfers of funds; increased instability of liabilities and heightened risks for asset quality for financial institutions, creating systemic risks for the stability of the financial sector and for monetary developments generally; adverse effects on tax collection and the allocation of public expenditures due to misreporting of income and wealth; contamination effects on legal transactions as transactors become concerned about possible criminal involvement; and other country-specific distributional

terms, bearing in mind that similar phenomena such as tax evasion remain largely unregulated in a number of jurisdictions.[35] At a further level, and similar to the 'criminal' logic of money laundering counter-measures, the balance between a threat - should it be considered as such- to the financial system and the adoption of broad invasive legal and regulatory measures to counter it remains to be assessed.

These issues become more acute in the light of the assertion by Savona and De Feo that 'both goals of penal deterrence/control and protection of financial transparency/integrity are closely connected, even if the first is centred more on criminal legislation and the second on the exercise of regulatory powers'.[36] In this 'merging' of objectives the limits are far from clear. As the authors assert, 'frequently there is a cross-over phenomenon, in which criminal penalties are applied to reinforce transparency/integrity of the financial system and regulatory policies are used to identify or deter criminal conduct'.[37] The issues become more accentuated when this merging of objectives meets the inherent complexity and ambivalence of the money laundering phenomenon. Prior to focusing on specific anti-money laundering discourses and their link with the adoption of money

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effects or asset price bubbles due to disposition of 'black money'. Commission of the European Communities (1998), *Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive*, COM (1998)401 final, Brussels, 1.7.1998, pp.18-19. On secondary literature, see the contributions in Savona, 1997.

[35] According to a recent study by the United Nations, money laundering and tax evasion involve in fact quite opposite processes: tax evasion involves taking legally earned income and hiding its existence or disguising its nature, thus turning legal into illegal income. On the other hand, money laundering aims at disguising the origin of illegal proceeds and making them appear legal. United Nations, Office for Drug Control and Crime Prevention, *op. cit.*, p.5. This distinction is closely related with the distinction between 'dirty' and 'hot' money. While 'dirty' money form the interest and goal of money laundering counter-measures because they are derived from a criminal activity that is considered morally wrong, 'hot' money represent proceeds that are either legal and misused, such as tax evasion, or illegal, but serving a series of purposes which are considered politically legitimate. This renders the legislative choice of what is included- and, more interestingly, what is excluded- from the definition of 'dirty' money in money laundering counter-measures rather artificial in many instances. On a compelling view on 'hot' money and their difference to 'dirty' money see B.A.K. Rider (1996), 'Taking the Profit Out of Crime' in B. Rider and M. Ashe (eds.), *Money Laundering Control*, Round Hall, Sweet and Maxwell, Dublin, pp.2-3; see also B.A.K. Rider (1996), 'The Practical and Legal Aspects of Interdicting the Flow of Dirty Money' in *Journal of Financial Crime*, vol.3, no.3, pp.234-253. For an extensive analysis of the global flow of 'hot money' and its link to international debt crises see R.T. Naylor (1994), *Hot Money and the Politics of Debt*, Black Rose Books, Montréal, New York, London.

[36] Savona and De Feo, *op. cit.* Also Savona, *op. cit.*

laundering counter-measures, it is essential to cast light on this ambivalence and the discursive mechanisms adopted to overcome it.

3. THE BLURRING OF BOUNDARIES AND THE 'NORMALISATION' DISCOURSE

In putting forward a comprehensive anti-money laundering framework, one of the greatest challenges emanates from the fact that the money laundering process occurs in the context of commonplace commercial activity. As has been pointed out, money laundering as *behaviour* 'may be perceptually indistinguishable from normal commercial activity of law-abiding persons depositing, transferring and using funds for lawful purposes'.[38] In the same spirit, Savona and De Feo note in the same work that the development of money laundering activities 'was not an anomalous aberration, but simply the dark side of modern economic and social development, in which illegal as well as legal enterpreneurs have learned to exploit global markets, economies of scale and lack of harmonization among national preventive and control policies'.[39] In this manner, the seemingly different worlds of 'dirty' money, 'black' markets and organised criminals are associated without inhibition with those of 'clean' financial systems, 'decent' bankers and the innocent public. As these worlds intermingle, their boundaries become blurred: the more 'dirty' money gets 'cleansed', the more 'contaminated' the financial system becomes. And the more the criminal is perceived as a commonplace customer, the greater the opportunity for the system to act 'dirty'.

The blurring of boundaries in the laundering of money through commonplace, everyday transactions constitutes a vivid illustration of what recent criminological writings have characterised as *'the criminogenic situation'*, whose governance, as

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[37] Savona and De Feo, *op. cit.*
[38] M.Levi (1997), 'Money Laundering and Regulatory Policies', in Savona, *op. cit.*, p.259.
[39] Savona and De Feo, *op. cit.*, p.10.

seen above, lies in a shift of emphasis from action upon deviant individuals to one designed to govern social and economic routines.[40] The difficulty in regulating this case lies in the inherent value of such routines, which constitute the 'criminogenic situation' and which have to be maintained and preserved. In balancing the goals of crime prevention and control and the preservation of everyday values it is crucial to 'align the actors objectives with those of the authorities'.[41] This is mainly achieved through the responsibilisation strategy, calling on the private sector to co-operate with the authorities in the fight against crime.[42]

In the evolution of the crusade against money laundering this has been attempted through recourse to a 'moralistic' justificatory framework. One of its main targets has been the so called 'myth of amoral business'.[43] Actors in the financial system, thus far justified to operate to a great extent under the laws of the market, are now called to take part in the fight against money laundering. In this mobilisation attempt, financial institutions are viewed with a combination of sympathy- being targets of organised crime- and reproach- accused of exactly assisting its operations. The 1988 Statement of the Basle Committee on Banking Regulations and Supervisory Practices is illustrative in this respect, stating that:

> 'Public confidence in banks, and hence their stability, can be undermined by adverse publicity as a result of *inadvertent association* by banks with criminals. In addition, banks may lay themselves open to direct losses from fraud, either through negligence in screening undesirable customers or where *the integrity of their own officers has been undermined through association with criminals*'.[44]

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[40] See the extensive analysis and bibliographical references in chapter 1. A similar term which ahs been put forward is that of 'crimogenic' profit oriented organisations: see C. Stanley (1996), 'Speculations on the Conflict of Discourses: Finance, Crime and Regulation' in *Journal of Financial Regulation and Compliance*, vol.4, no.3, pp.239-254.

[41] D. Garland (1997), ''Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology' in *Theoretical Criminology*, vol.1, no.2, p.186.

[42] For a detailed analysis, see chapters 1 and 5.

[43] R. De George (1990), *Business Ethics*, Macmillan, New York, p.3.

[44] Text reproduced in Gilmore (ed.), *op. cit.* Emphasis added.

Banks are thus viewed not only as potential victims, but also as actors, be it through inadvertent or conscious association with criminals. In the fight against the perceived threat of money laundering, neither of the two is acceptable. The myth of amoral business cannot be sustained in the quest for responsibilised actors in the fight against crime. Antithetically, through a recourse to notions of community and responsibility,[45] the amoral becomes immoral.

The moral overtones justifying this need for change, extend to the very heart of the financial world: the concept of money, viewed by the classical utilitarian approach as 'the most abstract and impersonal element in human life'.[46] Money is perceived as 'the absolute negation of quality', exclusively determined by quantity.[47]Viewed as the fitting neutral intermediary of a rational, impersonal market, money is thus objectified, expressing 'the economic relations between objects...in abstract quantitative terms without itself entering into those relations'.[48] The negation of any quality determining money is clearly reflected in the philosophy of Georg Simmel, according to whom 'the inhibiting notion that certain amounts of money may be 'stained with blood' or be under a curse are sentimentalities that lose their significance completely with the growing indifference of money'.[49]

It is striking to note that these sentimentalities regain their vigour in the anti-money laundering discourse, reflecting the view that the perception of the neutrality of money serves as an abetting factor for organised criminality.[50] A

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[45] See the extensive analysis in chapter 5.
[46] M.Weber (1971), 'Religious Rejections of the World and their Directions' in Gerth and Wright Mills (eds.), *From Max Weber:Essays in Sociology*, cited in V.Zelizer (1989), 'The Social Meaning of Money: 'Special Monies'' in *American Journal of Sociology*, vol.95, p.345.
[47] *Ibid.*
[48] G. Simmel (1978), *The Philosophy of Money*, cited in Zelizer, *op. cit.*
[49] *Ibid.*
[50] On the smell of money, see the arguments of W.Hetzer (1993), 'Der Geruch des Geldes - Ziel, Inhalt und Wirkung der Gesetze gegen Geldwäsche' in *Neue Juristische Wochenschrift*, Heft 51, p.3298. He argues that the *'pecunia non-olet'* (money does not smell) principle stands as a 'cynical remark', and focuses on the 'mental predisposition' (*Untergrund*) supporting the neutrality of money as helpful for organised crime.

recourse to the strongly emotive and symbolically charged imagery of 'dirty', 'stained' or 'black' money stemming from crime is essential to reshape well-established notions of liberal economic life. Such reshaping is inextricably linked with the representation of money laundering as a multifaceted threat. From an anthropological perspective, fruitful insights on the use of terms such as 'dirty money' are provided by Mary Douglas, who, stating that 'dirt offends against order', goes on to assess that 'eliminating it is not a negative moment, but a positive effort to organize the environment'.[51] The utilisation and function of concepts of 'dirt' in the security landscape is further elaborated by David Campbell, whose analysis is worth quoting at length:

> 'One might suggest that it is the extent to which we want to organize the environment - the extent to which we want to purify our domain - that determines how likely it is that we represent danger in terms of dirt or disease. Tightly defined order and strictly enforced stability, undergirded by notions of purity, are not *a priori* conditions of existence; some order and some stability might be required for existence as we know it...,but it is the degree of tightness, the measure of strictness, and the extent of the desire for purity which constitutes danger as dirt or disease'.[52]

These considerations are reflected in the development of the 'money laundering' terminology. Initially coined by U.S. law enforcement officials and entering popular usage during the Watergate inquiry in the mid-70's,[53] the term gained momentum during the securitisation of the money laundering phenomenon justifying national and international initiatives to counter it. In a very short time-span, not before the end of the 1980's, what is deemed as 'a useful shorthand phrase for a complex process',[54] pervaded policy analyses and discourses, finally being unanimously adopted as a legal term. Prior to the analysis of such

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[51] M.Douglas (1966), *Purity and Danger*, p.2, cited in D. Campbell (1992), *Writing Security. United States Foreign Policy and the Politics of Identity*, University of Minnesota Press, Minneapolis, p.93.
[52] Campbell, *op. cit.*
[53] Gilmore, 1993, *op. cit.*, citing P.Vallance, 'Money laundering: The Situation in the United Kingdom', paper presented to the Council of Europe Money laundering Conference, Strasbourg, France, 18-30.9.1992, typescript, p.1.
[54] Savona and De Feo, *op. cit.*

developments in the international arena, it is valuable to begin with the example of the United States, whose anti-money laundering policy has been highly influential for subsequent international initiatives.

4. MONEY LAUNDERING AS A THREAT AND MEASURES TO COUNTER IT: THE CASE OF THE UNITED STATES

The concern regarding money laundering and organised crime in the United States can be discerned as early as 1970, when the Congress enacted three laws which reflected the government's recognition of the organised crime threat and the need to combat it.[55] These laws were: the Organized Crime Control Act 1970;[56] the Bank Secrecy Act;[57] and the Drug Control Act 1970.[58] Of these enactments, the cornerstone for subsequent anti-money laundering initiatives has been the Bank Secrecy Act, whose stated purpose is 'to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings'.[59] The statute, rather than imposing itself reporting and recording requirements, serves as 'an enabling statute that explicitly authorizes the Secretary of the Treasury to fashion appropriate regulatory measures to meet the ends it sets forth'.[60] The most significant provisions emanating from the Act are the mandatory reporting scheme through the completion of Currency Transaction Reports (CTRs)

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[55] See J.Arrastia (1996), 'Money laundering - A U.S. Perspective' in B.Rider and M.Ashe (eds.), *op. cit.*, p.231.
[56] Title IX of Pub.L. No. 91-452, para. 901 (a), 84 Stat. 922 (197), codified at 18 U.S.C. para. 1961 et seq.
[57] Pub. L. No. 91-508, para. 221-223, 84 Stat. 1122 (1970), codified as amended at 31 U.S.C. paras. 5313(a); C.F.R. para. 102.1 (b) (1970).
[58] Pub. L. No. 91-513 (1970). All references in Arrastia, *op. cit.*
[59] 31 U.S.C. para. 5311(1995). See also M.S.Morgan (1996), *Money Laundering: The U.S. Law and its Global Influence*, Studies in International Financial and Economic Law, The International Finance and Tax Law Unit, Centre for Commercial Law Studies, Queen Mary and Westfield College and The London Centre for International Banking Studies in The London Institute of International Banking, Finance and Development Law, p.8.
[60] Morgan, *op. cit.*, pp.8-9.

and Reports of International Transportation of Currency or Monetary Instruments (CMIRs).[61]

Notwithstanding its early inception, the effectiveness of the Bank Secrecy Act until the mid-1980's was rather limited, both due to drawbacks regarding the reporting of transactions and the tenuous link with organised crime, and limited attention towards compliance and enforcement. The subsequent quest for amendment and expansion of the legislation became inextricably linked with the escalation in the 'war on drugs', which dominated the U.S. policy in the 1980's. According to the authors of 'Drug War Politics. The Price of Denial', 'nineteen eighty-one marked a watershed in the war of drugs'. In the following passage, they place emphasis on the central role of the Reagan discourse to this end:

> 'Brilliantly employing the power of the executive bully pulpit to galvanize public attention, the president used speeches, radio addresses, and special events to bring his declaration of war to the halls of Congress and directly into American homes. Pledging in October 1982 'to do what is necessary to end the drug menace', the president announced a 'legislative offensive' to make it easier to convict those involved with drugs and to keep them behind bars longer. In his 1983 State of the Union address, Reagan confirmed, 'It is high time that we make our cities safe again. The administration hereby declares an all-out war on big-time organized crime and the drug racketeers who are poisoning our young people'.[62]

The insertion of the 'war on drugs' as a key concept in U.S. internal -and foreign - policy,[63] has led to an increasing policy focus on money laundering, viewed as part of the financial side of drug trafficking. As Nadelmann notes, the fight against it 'was perceived as essential both to identifying and prosecuting the higher-level drug traffickers who rarely if ever came into contact with their illicit goods, and to tracing, seizing, and forfeiting their assets'.[64]

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[61] For an overview of these and other provisions, see Morgan, *op. cit.*, pp.9-10.
[62] E. Bertram, M. Blachman, K. Sharpe and P.Andreas (1996), *Drug War Politics. The Price of Denial*, University of California Press, Berkley, Los Angeles, London, p.113.
[63] On the 'war on drugs' in relation to U.S. foreign policy, see the analysis of Campbell, *op. cit.*
[64] E. A. Nadelmann (1993), *Cops Across Borders. The Internationalization of U.S. Criminal Law Enforcement,* The Pennsylvania State University Press, University Park, Pennsylvania, p.388.

The need to strengthen the anti-money laundering framework was expressed through the securitisation of the phenomenon and its identification with organised crime. This link was emphasised in the 1984 Report of the President's Commission on Organized Crime, which contains the following passage worth quoting at length:

> 'The existence of modern, sophisticated, often international services of financial institutions has contributed to the frightening financial successes of organized crime in recent years, particularly the narcotics trade. Without the means to launder money, thereby making cash generated by a criminal enterprise appear to come from a legitimate source, organized crime could not flourish as it now does. The need to launder money has led organized crime to avail itself of the full range of banking services normally associated with legitimate, multinational businesses'.[65]

In the Hearings Before the Subcommittee on Crime of the Committee on the Judiciary one year later, the Treasury's Assistant Secretary in Enforcement and Operations, followed the familiar, two-track road: he viewed money laundering as 'a serious challenge to law enforcement and a *clear danger* to the soundness and integrity of our financial system', adding that 'our free society and our diverse economy, wit its ready access to international financial networks, provide the setting for the money launderer's operations'.[66] He then went on to add that 'we could never hope to control drug trafficking and other forms of organized crime in our society unless we continue to go after the money that is at the heart of every criminal activity'.[67]

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[65] President's Commission on Organized Crime (1984), *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering (Interim Report to the President and the Attorney General),* October 1984, introduction.

[66] Statement of J.M.Walker Jr., Assistant Secretary (Enforcement and Operations), U.S. Department of the Treasury, in *Current Problem of Money Laundering*, Hearings Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 99th Congress, 1st Session, 12.9.1985, Washington, 1987, pp.3-4. Emphasis added.

[67] Walker Jr., *op. cit.*, p.4.

Through recourse to a highly emotive vocabulary, marked by the Us/Them dichotomy, money laundering is thus securitised and perceived as a threat for both the financial system and society as a whole. This tone continued to prevail in Walker's call for additional measures against money laundering, placing the emphasis on financial institutions. Commenting on the Bank Secrecy Act, he stated:

> '...as a society, it is essential that we set a higher goal: if we are to strike a telling blow against drugs and crime, we must go further, and strive to deny criminals access to our financial system. This, of course, is a task that law enforcement cannot accomplish alone. Banks and other financial institutions must do more to ensure that their employees do not become, wittingly or unwittingly, the prey of the criminal operations with cash to launder'.[68]

Such political *impetus* for the adoption of extensive money laundering counter-measures was expressed by calls for tougher law enforcement action, largely supported at the time by mass media representations. The most striking example is that of the Bank of Boston case, where the bank was found guilty of currency reporting violations. In a recent contribution, the case is examined under the spectre of 'landmark narratives', playing a 'crucial, but largely unrecognized role in generating new categories of problems and accompanying warrants for claimsmakers' preferred policies'.[69] It is noted that with the Bank of Boston case, the references to money laundering in the mass media rose to unprecedented heights compared to previous years, with the media adopting a 'rhetoric of uniqueness' both generating scandal and distinguishing the case.[70] In explaining this 'logic of selection', it is argued that, apart from serving basic organisational goals of law enforcement and the mass media, the case:

'1. appeared at an *opportune moment* for law enforcement;

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[68] Walker Jr., *op. cit.*, pp.9-10.
[69] L.T.Nichols (1997), 'Social Problems as Landmark Narratives: Bank of Boston, Mass Media and 'Money Laundering', in *Social Problems*, vol.44, no.3, p.324.
[70] Nichols, *op. cit.*, pp. 327 *et seq.*

2. sent a *symbolic message* that could not have been conveyed by prosecuting banks in notorious drug trafficking areas; and
3. provided what newsworkers perceived as an *exceptional story opportunity*, because

a. *it combined three problems* (currency-reporting violations, organized crime, drugs); and

b. also involved an alleged *corporate cover-up*.'[71]

In other words, it has been argued that 'although the construction of the case as a landmark narrative was in a sense arbitrary, the particulars of the case were well suited to presumed interests of major claimsmaker groups'.[72]

The outcome of the resulting political climate, notwithstanding strong reactions by civil liberties groups,[73] was the enactment of Subtitle H of the Anti-Drug Abuse Act of 1986, otherwise known as the Money Laundering Control Act of 1986.[74] The core provision is Section 1956, the content of which has been as follows:

> 'First, Section 1956(a)(1) takes aim at money laundering activities involving financial transactions (much like Section 5313 of the BSA's CTR and CTRC reporting requirements). Second, Section 1956(a)(2) criminalizes the actual or attempted movement of monetary instruments into or out of the United States in connection with unlawful activities (similar to the emphasis of Section 5316 of the BSA). Third, Section 1956(a)(3) specifically addresses criminal sting operations directed at money laundering, making it a crime to attempt to promote unlawful activity with, conceal the origin of, or avoid a

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[71] Nichols, *op. cit.*, p.333.

[72] *Ibid.* The influence of the Bank of Boston case is also highlighted by Morgan, stating that 'the public hullaballoo (sparked in large measure by the ambitiousness of the American press in reporting the shortcomings of the banking industry) piqued the interest of U.S. lawmakers: *op. cit.*, p11.

[73] Jerry J. Berman, speaking as Chief Legislative Counsel of the American Civil Liberties Union, raised before the Commission of the Judiciary concerns related to the evisceration of 'the modest protection afforded to customer bank records in the Right to Financial Privacy Act'; He also raised the Union's concerns about the breadth of conduct made criminal under the Act, which reaches 'conduct which is traditionally prosecuted under state and local law', or would make prosecutable 'conduct which may and should be left legal'. In *Current Problem of Money Laundering*, *op. cit.*, pp.373-374.

[74] Pub. L.. No. 99-570, 100 Stat.3207 (codified as amended at 18 U.S.C. paras. 1956-1957, 31 U.S.C. paras. 324-326).

transactional reporting requirement under state or federal law involving monies held out by law enforcement officials to be criminally derived'.[75]

Thus four years after the first judicial use of the term, 'money laundering',[76] instead of the already adopted term of 'recycling',[77] takes its place in U.S. legislative history. Leaving the symbolic level, it is also evident that the 1986 Act provides an unprecedented comprehensive framework of anti-laundering measures, covering many facets of the phenomenon which were influential for subsequent international initiatives. The new provisions are the outcome of the effort to amend drawbacks of previous legislation. Thus, apart from Sections 1956 and 1957-which criminalises the knowing acceptance of proceeds form crime-, the Act took effective measures to highlight the 'nexus' between money laundering and organised crime,[78] by amending Section 1961 of the Racketeer Influenced and Corrupt Organizations Act (RICO) 'to include violations of the money laundering statutes within the definition of 'racketeering'.[79] Furthermore, the Act contains a series of anti-structuring and forfeiture provisions.[80] Its scope was expanded by the 1988 amendments to the BSA, which broaden the Treasury's authority and impose additional duties to financial institutions.[81]

5. THE 'SECURITISATION' OF MONEY LAUNDERING IN THE INTERNATIONAL ARENA: CRIMINALISATION AND CONFISCATION

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[75] Morgan, *op. cit.*, p.12.
[76] The term was first used in the case of *US v. $4,255,625.39* (1982)551 F Supp 314. Gilmore, 1993, p.1.
[77] See the term *'Riciclaggio'*, in Italy, which, due to the Mafia presence, has been one of the pioneering countries in establishing anti-money laundering legislation. For an overview see inter alia G.Nanula (1992*), La Lotta Alla Mafia. Strumenti Giuridici. Strutture di Coordinamento. Legislazione Vigente*, Giuffré editore, pp.94 *et seq.*
[78] On the expression see Gurulé, *op. cit.*, p.824.
[79] Morgan, *op. cit.*, p.12 at note 31.
[80] For an overview, see Morgan, *op. cit.*, pp.19-24.
[81] Morgan, *op. cit.*, pp.24-26.

I. THE UNITED NATIONS

From the beginning of the 1980's, United Nations action reflected the concern of Governments with the deteriorating situation regarding drug abuse. This concern has been reflected *inter alia* in: General Assembly Resolution 35/195 of 15 December 1980, whose third Preamble paragraph refers to 'the growing threat caused by the spread of drug abuse, its serious impact on human health, its adverse effect on social development (social disintegration, increasing criminality), economic advancement and national security in a number of countries'; General Assembly Resolution 36/168 of 16 December 1981, going further to refer to 'the scourge of drug abuse' having reached 'epidemic proportions in many parts of the world', urging further national and international action; Resolutions 37/168 and 37/168 of 17 and 18 December 1982, where similar calls for international action were made; Resolution 38/93 of 1983, concerning 'measures to improve co-ordination and co-operation in the international struggle against illegal production of drugs, illicit drug trafficking and drug abuse' and in parallel recommending a number of measures taken by organisations of the United Nations system; and Resolution 38/122 of 16 December 1983, expressing the Assembly's appreciation of certain regional and interregional initiatives against drug trafficking and requesting *inter alia* to the Secretary-General to convene an interregional meeting of law enforcement agencies responsible for applying their countries' legislation concerning narcotic drugs and psychotropic substances.[82]

The increasing concern regarding drug abuse and trafficking, viewed as major threats in the international arena, led to the General Assembly Resolution 39/141 of 14 December 1984, entitled 'Draft Convention against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities'. In its paragraph 2, the Assembly requested

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[82] United Nations, *Draft Report of the International Conference on Drug Abuse and Illicit Trafficking*, Chapter II: Historical Background of the Conference, Rapporteur-General: P.O.Emafo, DOC: A/CONF.133/L.2, 24 June 1987, LIMITED, pp.2-3.

> 'the Economic and Social Council, taking into consideration Article 62, paragraph 3, and Article 66, paragraph 2, of the Charter of the United Nations and Council Resolution 9(I) of 16 February 1946, to request the Commission on Narcotic Drugs to initiate at its thirty-first session, to be held in February 1985, *as a matter of priority*, the preparation of a draft convention against illicit traffic in narcotic drugs which considers the various aspects of the problem as a whole and, in particular, those not envisaged in existing international instruments'.[83]

A draft convention text was annexed to the resolution as a working paper. Moreover, the Assembly adopted on the same date Resolution 39/142, its annex containing a 'Declaration on the Control of Drug Trafficking and Drug Abuse', which characterised both as an international criminal activity, and Resolution 39/143, entitled 'International campaign against traffic in drugs', which 'once again refers to the evils of the illicit production, marketing, distribution and use of drugs and inter alia urges that *'highest priority'* should be given to measures against these illicit activities'.[84]

The 'securitisation' of drug abuse and trafficking, through their conceptualisation as a threat and the prioritisation of the adoption of counter-measures, resulted in calls for a specialised conference to deal with the fight against drug trafficking. In 1985, the then UN Secretary-General, Javier Perez de Cuellar, called for 'a world conference at the ministerial level to deal with all aspects of drug abuse to be held in 1987'.[85] Adopting a similar 'securitising' discourse, de Cuellar stated that existing resources were inadequate to deal with the drugs plague, which was 'contaminating, corrupting and weakening the very fabric of society'.[86] This initiative, and vocabulary, were reflected in the two

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[83] United Nations, Economic and Social Council, *Implementation and Development of International Instruments on the Control of Narcotic Drugs and Psychotropic Substances*, Preparation of a draft convention against illicit traffic in narcotic drugs and psychotropic substances, Report of the Secretary-General, DOC. E/CN.7/1987/2, 17 June 1986, p.2. Emphasis added.
[84] United Nations, *op. cit.*, p.3. Emphasis added.
[85] *Ibid.*
[86] *Ibid.*

General Assembly Resolutions of 13 December 1985. Resolution 40/121 in its Preamble characterises the activities of transnational criminal organisations engaged in drug trafficking as a 'threat to the well-being of peoples, the stability of democratic institutions and the sovereignty of States', and calls in its second paragraph for 'maximum priority' to the fight against drug production, demand and traffic and related international criminal activities.[87] Resolution 40/122 on the other hand, expressed such concerns through the decision to convene the Conference in 1987 at the ministerial level

> '...as an expression of the political will of nations to combat the drug menace,...at the national, regional and international levels and to adopt a comprehensive multidisciplinary outline of future activities which focuses on concrete and substantive issues directly relevant to the problems of drug abuse and illicit trafficking...'.[88]

The 1987 Conference resulted in major commitments at international level, which were reflected in two adopted documents, namely the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control and the Declaration on Drug Abuse and Illicit Trafficking.[89] The *impetus* created by these global commitments led to a great extent to the adoption, in 1988, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[90] Its Preamble reflects the UN anti-drugs discourse and provides important insights on the link bewtween drug offences, organised crime and money laundering as threats in the emerging security landscape. Hence, the Preamble expresses the concern of the Parties to the Convention caused by 'the magnitude of and increasing trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose *a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political*

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[87] *Ibid.*
[88] United Nations, *op. cit.*, p.4.
[89] The decisions of the conference are reproduced in (1987) *International Legal Materials*, vol.26, pp.1637-1724.
[90] Text reproduced in Gilmore (ed.), *op. cit.*

foundations of society'. [91] This wide, all-encompassing threat is further extended through the recognition of 'the links between illicit traffic and other related organized criminal activities *which undermine the legitimate economies and threaten the stability, security and sovereignty of States'*.[92] The threat is also attenuated through the recognition of drug trafficking as an international criminal activity, requiring urgent suppression measures;[93] and, last but not least, through the acknowledgement that 'illicit traffic generates *large financial profits which enable transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels'*.[94] This acknowledgement is associated with the parties' determination 'to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing'.[95]

This broad security *rationale* resulted in the perception of a need for strong, extended and international emergency action. This has led to a Convention with a multitude of provisions, whose object has been 'to establish a strong, relatively uniform application of criminal justice in respect of drug-related offences that would enhance the effectiveness of international cooperation in this field'.[96] Deemed to be 'one of the most detailed and far reaching instruments ever adopted in the field of international criminal law'[97], the Convention covers a wide range of issues extending from criminalisation of specific activities to juridical matters such as legal mutual assistance, confiscation and extradition.[98]

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[91] Recital 1. Emphasis added.
[92] Recital 3. Emphasis added.
[93] Recital 4.
[94] Recital 5. Emphasis added.
[95] Recital 6.
[96] D.W.Sproule and P. St-Denis (1989), 'The United Nations Drug Trafficking Convention: An Ambitious Step' in *Canadian Yearbook of International Law*, p.271.
[97] D. Stewart (1990), 'Internationalising the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' in *Denver Journal of International Law and Policy*, vol.18, no.3, p.388.
[98] It must be noted here that, although the Convention does not expressly include any preventative money laundering counter-measures, it contains relevant pioneering provisions in its treatment of the control of precursor chemicals in Article 12, in particular paragraphs (9)-(12). Article 12(9)(a) calls for instance for the establishment and maintenance by the Parties to the Convention of a system

Central to the building of this framework is Article 3, which provides for the establishment of a series of offences. While Article 3(2) establishes a series of personal consumption offences, Article 3(1)(a) imposes a strict obligation on the participating states to criminalise a wide range of activities, from drug production, possession and cultivation (i-iv) to the organisation, management and financing of such activities (v). Furthermore, Article 3(1)(b) requires state parties to criminalise:

- the conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a. of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; and
- the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a of this paragraph or from an act of participation in such an offence or offences.

In this manner the Convention introduces, though not by the use of the actual term, the offence of drug-related money laundering. The provision is enriched by the criminalisation, subject to the constitutional principles and the basic concepts of their legal systems, of the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from a drug trafficking offence within the scope of Article 3(1)(a) and participation in, association or conspiracy to commit, attempts, and aiding, abetting facilitating, and concealing the commission of drug trafficking offences including money laundering (Article 3 (c) (iv)). The third paragraph of Article 3 determines the

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to monitor international trade of these substances 'in order to facilitate the identification of suspicious transactions'.

burden of proof in relation to such offences, providing that knowledge, intent or purpose 'may be inferred from objective factual circumstances'.

The significance of Article 3 for international co-operation in money laundering matters has been hailed. It has been noted that 'by requiring its criminalisation and treating it as a serious offence the drafters [of the Convention] have ensured that co-operation in respect of confiscation, mutual legal assistance and extradition will be forthcoming'.[99]

One of the central elements of the Convention is also the obligation imposed on participating countries to enable the confiscation of the proceeds derived from, and the substances, materials, equipment and other instruments used in drug trafficking (Article 5 (1)). The third paragraph of Article 5 obliges the parties to the convention to empower their courts or other competent authorities to order that bank, financial or commercial records be made available or seized. In the same paragraph it is specifically provided that parties shall not decline to act 'on the ground of bank secrecy'. Apart from the confiscation dimension that the erosion of bank secrecy as an indispensable step against money laundering is also reflected in the Convention in matters of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to drug trafficking offences (Article 7). Paragraph five of the Article explicitly provides that 'a Party [to the Convention] shall not decline to render mutual legal assistance... on the ground of bank secrecy'.

II. THE COUNCIL OF EUROPE

The first attempt by the Council of Europe to counter the money laundering phenomenon, has been formulated as early as in the beginning of the 1980s. Considering *inter alia* that 'the transfer of funds of criminal origin from one

[99] W.C.Gilmore (1992), 'International Efforts to Combat Money Laundering' in *Commonwealth Law Bulletin*, July, p.1132.

country to another and the process by which they are laundered through insertion in the economic system give rise to serious problems, encourage the perpetration of further criminal acts and this course the phenomenon to spread nationally and internationally', the Council adopted in 1980 Recommendation No R(80)10 on Measures Against the Transfer and Safekeeping of Funds of Criminal Origin.[100] The Recommendation calls on the Member States *inter alia*: to establish close national and international co-operation between banks and the appropriate authorities in exchanging information about the circulation of banknotes which have been used in connection with criminal offences and in following the movement thereof (point b); and to arrange that their banking system conducts identity checks on customers whenever an account or a securities deposit is opened, safe deposits are rented, cash transactions involving sums of a certain magnitude are effected and inter-bank transfers involving sums of a certain magnitude are made in both cases bearing in mind the possibility of transactions in several parts (point a i). As will be seen further below, the Recommendation fully embraces the philosophy of prevention so central to the programme of counter measures subsequently adopted by the Financial Action Task Force.[101]

However, the recommended measures were not generally implemented then, leading one commentator to characterise the Council of Europe as 'probably ahead of its time'.[102] The right time for a comprehensive action against money laundering under the auspices of the Council of Europe came in the second half of the 1980's. In line with the United Nations concerns at the time, the European Ministers of Justice, at their 15th Conference in Oslo, from 17 to 19 June 1986, discussed 'the penal aspects of drug abuse by smashing the drugs market, which was often linked with organized crime and even terrorism, e.g. by freezing and

[100] Text reproduced in Gilmore (ed.), *op. cit.*
[101] Gilmore, 1999, p.123.
[102] H.G.Nilsson (1991), 'The Council of Europe Laundering Convention: A Recent Example of a Developing International Criminal Law in *Criminal Law Forum*, vol.2, no.3, p.423 (419-441).

confiscating the proceeds from drug trafficking'.[103] The discussion resulted in the adoption of Resolution No.1, where it was recommended that the European Committee on Crime Problems (CDPC) should examine 'the formulation, in the light *inter alia* of the work of the United Nations, of international norms and standards to guarantee effective international co-operation between judicial (and where necessary police) authorities as regards the detection, freezing and forfeiture of the proceeds of illicit drug trafficking'.[104]

This initiative, along with the work of the Pompidou Group, led to the proposal by the CDPC in June 1987 to establish a Select Committee of Experts on international co-operation as regards search, seizure and confiscation of the proceeds from crime (PC-R-SC), which was authorised by the Committee of Ministers in September of the same year.[105] The terms of reference of the Select Committee were 'to examine the applicability of the European Penal law Conventions to search, seizure and confiscation of the proceeds from crime - and consider this question, in the light of the on-going work of the Pompidou Group and the United Nations, in particular as regards the financial assets of drug traffickers'.[106] The Committee should prepare, if deemed necessary, 'an appropriate European legal instrument in this field'.[107]

This led to the 1990 Council of Europe Convention on Laundering Search, Seizure and Confiscation of the Proceeds from Crime which aims to provide a complete set of rules applicable to all stages in proceedings, starting with the initial inquires into a laundering offence and continuing until the enforcement of a confiscation decision given abroad.[108] The Convention , which entered into force in

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[103] Council of Europe (1995), *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and explanatory report*, Council of Europe Publishing, p.5
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid.*
[108] P.Csonka (1998), 'Organised Crime: An Overview of the Relevant Council of Europe Activities' in P.J.Cullen and W.C.Gilmore (eds.), *Crime Sans Frontières: International and European Legal Approaches*, Edinburgh University Press, Edinburgh, p.96.

1993, has been aimed at a wide range of states including non-European ones, something that explains the non use of the word European in its title.[109] Furthermore, one of its basic aims was to maintain the standards introduced by the UN 1988 Convention. As has been pointed out in the official Explanatory Report:

> the relevant provisions of the United Nations Convention were constantly taken into consideration: on the one hand, the experts tried as far as possible to use the terminology and the systematic approach of that convention unless changes were felt necessary for improving different solutions; on the other hand, the experts also explored the possibilities of introducing in the Council of Europe instrument stricter obligations than those of the United Nations Convention on the understanding that the new Convention - in spit of the fact that it is open to other states than the Member States of the Council of Europe will operate in the context of a smaller community of like-minded states'.[110]

The *rationale* of the Convention has also been similar with the one of the United Nations. Notwithstanding its departure from strictly drug related offences to embrace criminal activity in general, the Preamble links, in a similar manner with the Vienna Convention, serious crime and money laundering, both perceived as broad and multi-faceted threats. The Parties to the Convention declare their conviction of 'the need to pursue a common criminal policy aimed at the protection of society'.[111] This protection is to be achieved through the fight against serious crime, by the use of 'modern and effective methods on an international scale';[112] one of these methods, the Preamble continues, 'consists in depriving criminals of the proceeds of crime'.[113]

To this end, Article 6 of the Convention, designating the laundering offence, is based on the terminology utilised in Article 3 of the 1988 Convention. However, the provision extends beyond the UN Convention: not only by differences in wording such as 'laundering' in the title of the Article and the non-inclusion of the

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[109] Nilsson, *op. cit.*, p.423.
[110] Point 14, cited in Gilmore, 1999, p.125.
[111] Recital 2.
[112] Recital 3.

element of participation,[114] but most significantly by imposing an obligation, albeit qualified (see Article 6(4)), on participating states to criminalise money laundering on an 'all crimes' basis. This choice, decoupling money laundering from the strict ambit of drug trafficking, has been adopted by an increasing number of states and international bodies., such as the Financial Action Task Force. The widening of the money laundering offence is accompanied by an extension of the definition of proceeds including 'any economic advantage from criminal offences' (article 1a), and by an extension of criminalisation of certain acts, including negligent laundering which under Article 6(3) is permitted but not required.

However, this not the only innovation of the Council of Europe Convention. A substantial step forward has been made with regard to jurisdiction issues in cases where the predicted offence was committed extraterritorially. In this respect, the second paragraph of Article 6 provides *inter alia* that 'it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party' (6(2)(a)). This is an important step for international co-operation 'given the transnational nature of sophisticated money laundering operations'.[115]

A further illustration of the willingness to extend the scope of the Council of Europe Convention appears in the formulation of measures related to domestic confiscation. Article 2(1) provides that 'each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property value of which corresponds to such proceeds'. The provision, which was drafted in acknowledgement of the lack of sufficient legislation in several states, should be seen 'as a positive obligation for states to enact adequate confiscation legislation.[116]

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[113] Recital 4.
[114] Explanatory Report, point 3.
[115] Gilmore, 1999, p.127.
[116] Explanatory Report, point 25, cited in W.C. Gilmore (1997), 'International and Regional Initiatives' in Rider, *op. cit.*, p.11.

The second paragraph of Article 2 sets a limit on this extension, by allowing the possibility of reservations by the participating states. The latter may, through the form of a declaration, limit the scope of Article 24 only to a series of specified offences or categories of offences. In acknowledgement of the uneasy symbiosis of such flexibility with the expansive aim of the Convention, the Committee of experts agreed that 'such states should review their legislation periodically and expand the applicability of confiscation measures, in order to be able to restrict the reservations subsequently as much as possible. [The Committee] also agreed that such measures should at least be made applicable to serious criminality and to offences that generate huge profits'.[117] Moreover, the mere fact that a party may enter a reservation as regards a specific offence is not synonymous with a refusal of a request within the framework of international co-operation in confiscation matters. Article 18 of the Convention states only optional grounds for refusal.

6. THE 'SECURITISATION' OF MONEY LAUNDERING IN THE INTERNATIONAL ARENA: PREVENTION

I. THE BASLE COMMITTEE

The evolution of an international framework of money laundering control has been accompanied by the emergence of policies of prevention. Those policies focus primarily on the role of the financial system in the fight against money laundering. This *rationale* is reflected in the formulation of the first comprehensive preventive effort at international level, set forth by the Basle Committee on Banking Regulations and Supervisory Practices.[118] Acknowledging the role that banks can play in money laundering, the Committee issued in 1988 what they deemed as 'a general statement of ethical principles which encourages banks' management to put

[117] Explanatory Report, point 27.
[118] On a general overview of the history, nature and work of the Basle Committee, see L.L. Lee (1998), 'The Basle Accords as Soft Law: Strengthening International Banking Supervision' in *Virginia Journal of International Law*, vol.39, no.1, pp.1-40.

in place effective procedures to ensure that all persons conducting business with their institutions are properly identified; that transactions that do not appear legitimate are discouraged; and that co-operation with law enforcement agencies is achieved'.[119] The main points of the Statement, which is not legally binding, are:

-. *Customer identification*; banks are called to determine the 'true identity' of all customers, with emphasis placed on ownership identification and accounts using safe-custody facilities. Banks are *inter alia* called to adopt an 'explicit policy that significant business transactions will not be conducted with customers who fail to provide evidence of their identity'.[120]

-. *Compliance with laws*; banks are called upon to ensure that 'business is conducted in conformity with high ethical standards and that laws and regulations pertaining to financial transactions are adhered to': While acknowledging the difficulty of the task, it is stated that they 'should not set out to offer services or provide active assistance in transactions which they have good reason to suppose are associated with money laundering activities'.[121]

-. *Co-operation with law enforcement authorities* - within the limits of customer confidentiality, banks are called in a negative manner to avoid providing support or assistance to customers 'seeking to deceive law enforcement agencies through the provision of altered, incomplete or misleading information'; banks are at the same time to assist in a positive manner to take measures such as denying assistance, severing relations with the customer and closing or freezing of accounts should they be led to a 'reasonable presumption' that the money in question stems from a criminal activity or that the transactions are criminal in purpose.[122]

II. THE FINANCIAL ACTION TASK FORCE

[119] Preamble, recital 6. Text reproduced in Gilmore (ed.), *op. cit.*
[120] Principle II *in fine*.
[121] Principle III.
[122] Principle IV.

The preventive role of the financial system has since been substantially enhanced through the initiatives of the Financial Action Task Force (FATF), an intergovernmental and multidisciplinary group convened by the 1989 Paris Summit Meeting of the Group of Seven (G7) with the mandate 'to assess the results of co-operation already undertaken in order to prevent the utilisation of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field'.[123] With its membership having expanded to include 26 OECD jurisdictions (including all 15 EU Member States), the European Commission and the Gulf Co-operation Council, FATF is 'the only international body which specialise in and concentrates solely upon the fight against money laundering'.[124]

One of the major contributions of the FATF in the fight against money laundering has been the formulation in the 1990 Report of the so-called 40 Recommendations.[125] According to Noble,

> 'the Recommendations are designed to provide a blueprint for action against money laundering covering: The criminal justice system and law enforcement; the financial system and its regulation; and international co-operation. We recognise that there can be significant differences between the legal systems, financial systems and, indeed, the money laundering situations of different countries. So the Recommendations allow considerable flexibility in how they are applied and concentrate on laying down the general principles for combating money laundering rather than proscribing in great detail what should be done. This means that they can have a global application.'[126]

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[123] G7 Economic Declaration of 16 July 1989, point 53, reproduced in Gilmore, 1992, p.3.
[124] T. Sherman (1993), 'International Efforts to Combat Money Laundering: The Role of the Financial Action Task Force' in MacQueen, *op. cit.*, p.20. The FATF has recently decided to expand its membership, on the basis of a series of political, strategic and legal criteria, 'to a limited number of strategically important countries which could play a major role in their regions in the process of combating money laundering': FATF , *Annual Report 1998-1999*, paragraph 149.
[125] Text reproduced in Gilmore (ed.), *op. cit.*
[126] R. Noble, 'The Financial Action Task Force Recommendations and Their Implementation', unpublished paper presented in the International Conference on Preventing and Controlling Money Laundering and The Use of The Proceeds of Crime: A Global Approach, Courmayeur, Mont Blanc, Italy, 17-21 June 1994, point 5.

The first part of the Recommendations, setting out their general framework, justifies their adoption on the grounds of 'the need for rapid and tough actions' and 'the need for practical measures'.[127] In this context, the Recommendations refer to 'the growing dimension and increasing awareness of the problem of money laundering' which would justify a reinforcement of the Vienna Convention provisions in the field; furthermore, to avoid the risk of discrepancies between national measures, a call is made to build upon and enhance the Basle Statement of Principles and to proceed towards harmonisation of practical aspects not covered by it.[128]

The second part of the Recommendations is thus devoted to the 'improvement of national legal systems to combat money laundering'.[129] A definition of the criminal offence of money laundering is attempted, with Recommendation 5 calling for an extension of the scope of the offence to 'any other crimes for which there is a link to narcotics', or, alternatively, to criminalise money laundering based on 'all serious offenses, and/or on all serious offenses that generate a significnat amount of proceeds, or on certain serious offenses'. Recommendation 7 goes further to suggest the attribution of corporate criminal liability in money laundering cases. Complementing this framework, Recommendation 8, largely based on the Vienna Convention, covers provisional measures and confiscation.

The third part, constituting the cornerstone of the FATF initiative, aims at the 'enhancement of the role of the financial system',[130] their scope extending to bank and non-bank financial institutions.[131] The institutions concerned are called upon to comply with a series of duties related to:

-. *Customer identification and record keeping rules* - financial institutions are called not to keep anonymous accounts or accounts in obviously fictitious names,

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[127] Recommendation 3.
[128] *Ibid.*
[129] Recommendations 4-8.
[130] Recommendations 9-29.
[131] Recommendation 9.

and identify their customers on the basis of reliable documentation; to obtain information regarding beneficial ownership of accounts; and to maintain, for at least five years, transaction records.[132]

-. *Increased diligence* - financial institutions are called *inter alia* to pay special attention to complex or unusual transactions, whose background and purpose must be examined; furthermore, they are permitted or required to promptly report to the competent authorities of their money laundering suspicions, and calls are made for legal provisions to protect financial institutions and their employees from criminal or civil liability for breach of any disclosure of information if they report in good faith, even if they have not known precisely what the underlying criminal activity was, and regardless of whether it actually occured; financial institutions are called on not to warn their customers about these reports, to comply with instructions from the competent authorities, and to develop programmes against money laundering.[133]

Further Recommendations in this part deal with: measures to cope with countries with no or insufficient anti-money laundering measures, calling on financial institutions *inter alia* to give special attention to transactions stemming from these countries, and apply equivalent principles to their branches and majority owned subsidiaries located abroad; [134]other measures to avoid currency laundering;[135] and implementation and role of regulatory and other administrative authorities.[136] The Recommendations are complemented with part four, aiming at strengthening international cooperation.[137]

The pivotal contribution of the Recommendations lies in the extension and systematisation of the ethical principles put forward by the Basle Committee. The comprehensive framework of 'soft law' duties for the financial system, called upon

[132] Recommendations 12-14.
[133] Recommendations 15-20.
[134] Recommendations 21-22.
[135] Recommendations 23-25.
[136] Recommendations 26-29.

to co-operate with the competent authorities against the problem of money laundering, complements the extensive international initiatives in the field, calling for wide emergency measures to counter it.[138]

7. CONCLUDING REMARKS

Within less than a decade, a global legislative and regulatory framework has been initiated in order to fight a phenomenon previously in the shadow and now in the limelight: money laundering. A multitude of international 'hard' and 'soft' laws, have established a series of measures stemming from the insertion of the money laundering phenomenon in a security logic: normative production, especially criminalisation through the creation of a new criminal offence, responsibilisation, through the call to private parties to help the authorities counter the perceived threat, and new instances of policing, as the outcome of such cooperation. In this manner, important steps have been taken towards the construction of a 'global prohibition regime' regarding money laundering.[139]

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[137] Recommendations 30-40.

[138] It is important to note here that the FATF has since assumed an active role in the implementation of the Recommendations. The latter have been reviewed in a major 'stocktaking' review in 1996. William Gilmore summarises the amendments as follows: extension of the money laundering predicate offences from drug offences to serious offences determined as such by each country (Recommendation 4); application of appropriate measures to the conduct of financial activities by non-financial businesses or professions (Recommendation 9); application of appropriate measures to non-bank financial institutions even those which are not subject to a formal prudential supervisory regime in all countries (Recommendation 8); mandatory reporting of suspicious transactions (Recommendation 15); consideration of further measures in respect to shell corporations, acknowledging their abuse potential (Recommendation 25); expansion of the recommendations dealing with customer identification (in particular Recommendations 10 and 13); in the same context, proactive consideration of new technology developments, acknowledging money laundering threats inherent in new or developing technologies that might favour anonimity (Recommendation 13); strengthening of measures in respect of bureaux de change (Recommendation 8); introduction of measures relating to cross-border currency movements (Recommendation 22); and utilisation of controlled delivery operations in a money laundering context (Recommendation 36).Gilmore, 1997, p.7. On the necessity and impact of these amendments, see chapter 3.

[139] On the term, see E.A.Nadelmann (1990), 'Global Prohibition Regimes: The Evolution of Norms in International Society' in *International Organization,* vol. 44, no.4, pp.479-526. Nadelmann validly predicted then the transfer of money laundering into the fourth, and strongest, stage of global prohibition regimes, i.e. when 'the activity becomes the subject of criminal laws and police action

The consensus towards the adoption of these new and highly invasive measures[140] is inextricably linked with the securitisation of the money laundering phenomenon. As this chapter has attempted to demonstrate, the fight against money laundering has been constantly justified by policy-making discourses on its association with the universal threat of drug abuse, trafficking and subsequently organised crime. What is still not clear, however, apart from evaluations concerning the perception of transnational criminality as a security threat, is whether money laundering *per se* is equated to such threat, or whether it merely constitutes a means to an end, or, in other words, the counter-measures are needed not to counter the threat of money laundering, but that of transnational crime. This is not a purely theoretical issue, as it has significant consequences both for the evaluation of the money laundering offence - for instance, what is protected by it? - and the balancing of invasive measures to the individual sphere, established through reporting financial information to the authorities, with constitutional principles, human rights and civil liberties.

The two-fold justification of the strategy to combat money laundering, far from enlightening, further complicates the discussion. This is vividly reflected in the case of the European Community, which, through its Member States and as an organisation, took an active part in the building of such initiatives. In the further call for specific EC money laundering counter- measures, the peculiar and uneven coexistence of protection from crime with the protection of the financial system,

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throughout much of the world, and international institutions and conventions emerge to play a coordinating role'-p.485. Apart from the aforementioned initiatives, a number of international and regional bodies have included in their mandate, or were created for the purpose, to put forward anti-money laundering measures. On an overview see V. Mitsilegas (1999),'International and Regional Initiatives' in B. Rider and Ch.Nakajima (eds.), *Anti Money Laundering Guide*, CCH editions Ltd., Bicester.

[140] It is important to note here that, in November 1999, 153 states were parties to the Vienna Convention, including all EU member states. The Council of Europe Convention on the other hand has been ratified by and entered into force in 27 countries, including 14 EU member states. The remaining one, which is Luxembourg, belongs to the group of 9 states which have signed but not yet ratified the Convention. Sources: United Nations Drug Control Programme, Monthly Status of Treaty Adherence, 3.11.1999, downloaded from http://imolin.org; andCouncil of Europe, European Treaties, Signatures and Ratifications, 14.12.1999, downloaded from http://www.coe.fr

was transformed into an uneasy relationship, touching upon matters of competence, legitimacy and national sovereignty. It is essential to examine such issues in detail, prior to casting light on the context of the EC anti-money laundering initiative.

3

Money laundering counter-measures in the European Union: history, content and evolution

1. THE HISTORY OF THE EC MONEY LAUNDERING DIRECTIVE

I. THE EUROPEAN COMMUNITY AND DRUGS

The concern of the European Community regarding the expansion of drug abuse and trafficking can already be discerned in a group of five Resolutions which were adopted by the European Parliament in September 1985.[1] In one of them, the Resolution 'on action to combat drug abuse', the Parliament appeared to be 'deeply concerned at the growth in the problem of drug abuse'.[2] Moreover, the conviction was expressed that 'there must be a high degree of international cooperation, particularly at the European level, to tackle this scourge', as was the belief that 'the Community as such has a particular role to play in ... co-ordination of police and customs action to prevent illicit imports of drugs into the Community and to make more effective the detection and prosecution of traffickers'.[3]

This Resolution was complemented by the Resolution 'on measures to combat drugs - taking'.[4] The Parliament considered therein that 'it is within the European Community's sphere of responsibility to take appropriate measures to combat the illegal importation, trafficking and abuse of drugs in the Member States' and called

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[1] Resolutions 'on action to combat drug abuse'; 'on combating drug abuse'; 'on measures to combat drugs-taking'; 'on measures to combat the spread of drug abuse'; and 'on measures to combat the spread of drugs'. OJ C262, 14.10.1985, pp.119-123.
[2] DOC. B2 801/85, OJ C262, 1985, p.119. Point A.
[3] *Ibid.*, points C and D.

on the Council and the Member States to ensure that these efforts are focused on 'increasing measures to detect drug trafficking networks at Community frontiers', and on the 'dismantling of these measures by stepping up measures against traffickers'.[5]

However, it is in the Resolution 'on measures to combat the spread of drug abuse'[6] that the securitisation of drug trafficking and organised crime is the most evident in the Parliament's discourse. The Parliament, acknowledging that 'drug trafficking encourages the most dangerous forms of organized international crime', confirmed 'the *urgent need* to harmonize legislation on narcotics, at Community level and for co-ordinated Community action to combat drugs in the following sectors in particular ... co-ordination of police measures for the prompt identification of drug traffickers and stricter controls at the Community's external frontiers' and 'much higher penalties for drug traffickers involving the confiscation of all property connected with illegal trafficking'.[7]

The political pressure by the Parliament on the Community to step up action against drug trafficking, through the securitisation of both drugs and organised crime, gained further momentum in the 1986 Resolution 'on the drug problem'.[8] In an unprecedented use of emotive discourse, the Parliament appeared '*alarmed* at the *worrying increase* of the drug problem' and '*appalled* by the Member States' reluctance to acknowledge the extent of the problem'.[9] Furthermore, it identified the threat noting that 'the illegal drug trafficking is carried on by criminal organizations with immense resources and capital at their disposal', centering it on the fact that the activities of these organisations 'extend far beyond drug

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[4] DOC. B2 803/85, OJ C262, 1985, p.121.
[5] *Ibid*, points 1 and 3.
[6] DOC. B2 806/85, OJ C262, 1985, p.122.
[7] *Ibid,* points 1 and 3
[8] Amendment replacing documents B2 875, 884 and 887/86, in OJ C283, 1986, p.79.
[9] *Ibid*, points E and C.

trafficking, even influencing the political and economic system in many countries'.[10]

The concerns of the European Parliament were reflected in the conclusions of the European Council held in the Hague, on the 26 and 27 June 1986. The European Council expressed itself 'gravely concerned about the serious problem of drug abuse', and called for 'ad hoc collaboration between the Member States and the European Commission to examine what initiatives could be taken in this area without there being any duplication with the work carried out elsewhere'.[11] In this context, it was assessed that the contribution of the Community to the United Nations 1987 Conference should also be examined.

This mobilisation led to the Commission's Recommendation for a Council Decision on Community participation in the United Nations conference.[12] In its Explanatory memorandum, the Commission noted that 'there has been an alarming intensification and acceleration of illicit drug production, traffic and consumption since the start of the 80s'.[13] The extended analysis of this contention included a reference to drugs not only as a social problem in the developed countries, but also as 'a serious threat to society and the State in Third World countries'.[14] Focusing on the clandestine economy created in these countries by drug production, demand and marketing, the Commission noted that such economy 'could imperil the structures and very survival of the states in question to the advantage of other interest groups, which have been multiplying their gains not only in the developed consumer countries but also, albeit to a much lesser extent (10%), in the most speculative sectors of the domestic economies of the producer countries, *thanks to the 'laundering' of illicit trafficking revenue*, with numerous financial institutions -

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[10] *Ibid*, points F and G.
[11] Conclusions of the European Council, reproduced as annex IV in: Commission of the European Communities, *Recommendation for a Council Decision on Community participation in the preparatory work and the International Conference on Drug Abuse and Illicit Trafficking (submitted to the Council by the Commission),* COM (86)457 final, 5.8.1986.
[12] *Ibid.*
[13] Commission of the European Communities, *op. cit.*, p.1.

having the most respectable credentials - collaborating, and sharing in the profits'.[15] This was the first time that an EC policy document had expressed reference to money laundering, and one cannot but emphasise the securitisation of the phenomenon and the powerful imagery of blurred boundaries, with apparently 'respectable' financial institutions held accountable for the demise of the developing world through drug money laundering.

The Commission referred further to the United Nations Conference on Drug Abuse and Illicit Trafficking, stating that its framework of measures involves the Community in the following three main ways: ' stepping up of intra-Community and intra-European cooperation, in accordance with the responsibility vested in the Community in this matter; cooperation at bilateral and regional levels with developing countries which produce drugs; participation in conventional international instruments, with a view in particular to drawing up the new International Convention'.[16] On this basis, the Commission recommended the Community's participation in the 1988 United Nations conference.[17] This led to the participation of the Community as an organisation in the Conference, and the negotiation and conclusion on its behalf of the Vienna Convention.[18] However, the Community's involvement was not exhausted there, but was enhanced through the adoption of a specific EC legislative measure aimed at preventing money laundering.

II. THE EC MONEY LAUNDERING DIRECTIVE: RHETORIC AND JUSTIFICATIONS

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[14] Commission of the European Communities, *op. cit.*, p.3.
[15] Commission of the European Communities, *op. cit.*, pp.3-4.
[16] Commission of the European Communities, *op. cit.*, p.6.
[17] See sole article of Recommendation, Commission of the European Communities, *op. cit.*, p.15.
[18] Council Decision of 22 October 1990 concerning the conclusion, on behalf of the European Economic Community, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, OJ L 326, 24.11.1990, p.56. The Decision was accompanied by an annexed Declaration, according to which EC competence regarding the approval of the Convention

In the same year as the approval of the Vienna Convention on the behalf of the Community, the Commission issued a Proposal for a 'Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering'.[19] In its Explanatory Memorandum to the Proposal, the Commission, in line with previous international initiatives, depicted money laundering as 'an activity becoming more and more widespread every day', having 'an evident influence on the rise of organised crime in general and drug trafficking in particular'.[20]

In view of the multitude, diversity and extended scope of previous or simultaneous international initiatives to combat money laundering, the necessity of an additional anti-laundering initiative at the European Community level, especially taking into consideration the Community's conclusion of the Vienna Convention and its members' participation in the Council of Europe Convention and in the FATF, appears at first sight questionable. In assessing the necessity for the measure, the Explanatory Memorandum - largely reflected in the Preamble of the proposed directive- follows largely the familiar two-fold threat rationale: on the one hand, money laundering is viewed as a threat to the financial system since, 'as credit and financial institutions are frequently used to carry out these kinds of activities, the soundness and stability of the particular institutions involved as well as the prestige of the financial system as a whole could be seriously jeopardised, thereby losing the confidence of the public';[21] on the other hand, express reference is made to 'the public demand throughout the Community for measures which can help to reduce the scourge of drugs', [22] picturing drugs as a threat to broadly defined interests such as health, life or the social fabric. The Preamble of the

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extends only to issues of commercial policy related to substances used in illicit drug manufacturing and dealt with in Article 12.

[19] OJ C 106, 28.4.1990, p.6.

[20] Explanatory Memorandum, in House of Lords Select Committee on the European Communities, *Money Laundering*, HL Paper 6, 1990-91, reproduced in W.C.Gilmore (ed.) (1992), *International Efforts to Combat Money Laundering*, Grotius publications Ltd., Cambridge.

[21] Explanatory Memorandum, *op. cit.*, II,2.

Directive Proposal emphasises furthermore the awareness that combating money laundering is one of the most effective means of opposing organised crime and drug trafficking, which constitute 'a particular threat to Member States' societies'.[23]

However, the justifications for the adoption of EC anti-laundering legislation are not exhausted here. An important factor necessitating such action is linked with the construction of the Single Market. The Community is deemed responsible for protecting the market from both its infiltration with criminal money - with launderers taking advantage of the single market and the freedoms of capital movements and supplying financial services that the area involves- and the distortions of competition caused by uneven national anti-laundering measures.[24] This *rationale* was explained at the time in detail by a Commission official as follows:

> 'The coming into effect of the Single Banking Licence through the European Community meant that supervisory authorities would have no scope for refusing authority to a bank established in another Member State to set [up] a branch or to provide banking services. If this system of home country licensing were to work effectively and maintain public confidence it was essential that there should be legal certainty that Member States would adopt the same approach to money laundering. In the absence of Community action against money laundering Member States could adopt measures inconsistent with the completion of the Single Market in an effort to protect their financial system from money laundering. For the purpose of legal certainty it was essential that the Commission should be able to take infraction proceedings against Member States before the European Court of Justice. A resolution or code would not be sufficient to achieve this. Although all Member States had signed the Vienna Convention only two Member States had ratified it. There was no Community competence to require Member States to ratify: Community competence was limited to the areas of precursor chemicals. The central objective of the commission's proposal was therefore one of financial supervision to prevent the use of the financial system for the alien purposes of money laundering. It also has an indirect- but also

[22] Explanatory Memorandum, *op. cit.*, II,5.
[23] Preamble, recital 3.
[24] Explanatory Memorandum, *op. cit.*, II, 4. Commission Proposal, Preamble, recital 2.

important objective: to make the financial system play a preventive- but effective- contribution to the fight against this phenomenon.'[25]

The same analysis highlighted two further, political rather than legal, justifications for Community action in the field: the existence of a practical need for the Community 'to show the outside world that they were acting in a united manner in the matter of money laundering', particularly following pressure from the United States; [26]and the need to complement the existing anti-money laundering measures, as the need was acknowledged to go beyond the scope of the Vienna Convention, covering not only criminalisation, but also prevention, and to give legally binding force to the content of the 'soft law' FATF Recommendations.[27] In this manner, the EC Directive constituted an ambitious legislative effort to embrace both the aspects of prevention and control.

III. THE CONTROVERSY OVER THE LEGAL BASIS

The *rationale* and the objective of the Directive has been to cover aspects of both prevention and control. However, in its justificatory realm, the Commission's discourse has been marked by an emphasis on the functioning of the Single Market, viewed as criminogenic, enabling criminals to freely move in its area, and at the same time vulnerable to this very movement. In this manner, the justifications

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[25] Note of Informal Discussion in Brussels with Mr. Geoffrey Fitchew, Director General, D-G XV (Financial Institutions and Company Law) as Agreed by the Commission for Publication, in House of Lords, *op. cit.*, p.28.

[26] House of Lords, *op. cit.*, p.29. In this context, the following have been stated in detail: 'Of particular significance in this context was the United States legislation known as the Kerry amendment which required United States branches of foreign banks to report to United States authorities all transactions over $10,000. Banks having no subsidiary or branch in the United States but dealing in dollars were required to maintain records of such transactions and to make them available to US inspectors. Failure to comply would render foreign banks liable to sanctions which would operate if they sought to do business within US territorial jurisdiction. The Us authorities were pressing other States to comply with this legislation and introduce similar requirements themselves. European Community States did not accept that the United States were entitled to impose these requirements extraterritorially and regarded this kind of reporting requirement as costly and ineffective. In order to continue effective dialogue with the US authorities it was important for the Community to be seen to have its own effective measures in place to combat money laundering.'

[27] *Ibid.*

related to an anti-money laundering legislation as a means of attacking crime, were largely overshadowed by justifications related to the protection not only of the financial system, but also of the Single Market, meriting *per se* specific protection. These considerations have been largely reflected in the assertion by Cullen that the Directive 'can be seen as part of the Community's contribution to efforts to prevent the spread of drug trafficking and organized crime in general, though it is not *overtly* a security measure but one designed to protect the integrity of the Community's financial market'.[28]

This balance in the rationale has been reflected in the choice of the legal basis of the proposed directive. This was based on the third sentence of Article 57(2) of the EEC Treaty, set within the framework of the right to establishment, stating that the Council, in adopting measures in this respect, 'shall act by a qualified majority, in cooperation with the European Parliament'. This choice remained in principle unscathed in the European Parliament's first reading of the Proposal, which however added to the legal basis reference to the first sentence of Article 57(2) (now 47(2)).[29] This sentence specifies that in order to make it easier for individuals to take up and pursue activities as self-employed persons, the Council shall 'issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons'. This amendment was adopted by the Commission's amended Proposal, 'in line with other directives in the financial services field'.[30]

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[28] P.J. Cullen (1993), 'The European Community Directive' in H.L.MacQueen (ed.), *Money Laundering*, Edinburgh University Press, Edinburgh, p.35. Emphasis added.

[29] European Parliament, Legislative Resolution (Cooperation procedure: first reading) embodying the opinion of the European parliament on the proposal from the Commission to the Council for a directive on prevention of use of the financial system for the purpose of money laundering, DOC. A3-273/90, p.4.. See also OJ C324, 24.12.1990, p.257.

[30] Commission of the European Communities, *Amendment to the proposal for a Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering*, COM (90)593 final - SYN 254, Brussels, 30 November 1990 ,p.2. See also OJ C319, 19.12.1990, p.9.

The proposed legal basis caused the reactions of the Community institutions in the readings of the Directive. Most of these reactions emanated from the controversy surrounding the actual scope and objective of the measure. The Committee on Economic and Monetary Affairs and Industrial Policy stated in its Opinion that the proposal, apart from the operating conditions of financial institutions, 'also seeks to approximate the laws of the member States in the sphere of criminal law and procedure'.[31] It is interesting here that the Committee assessed the 'criminal' nature of the Directive not only on the basis of the provision it contained on the criminalisation of money laundering, but also on the provisions placing credit and financial institutions under the duty to co-operate with law enforcement authorities.[32] For that reason, the Committee contended that 'the legal basis should therefore also refer to Article 100a which deals with the adoption by the Council of measures for the approximation of the laws of the Member States having as their object the establishment and the operation of the single market and, as it was noted by the Committee, in particular, the free movement of capital. [33]

The issues surrounding the choice of Article 57 as the legal basis for the directive have been put forward in detail by the Economic and Social Committee, whose Opinion on the draft directive referred explicitly to 'an uncertain legal basis'.[34] The Committee was of the view that 'in reality one of the proposal's aims is to approximate the laws of the Member States in the field of criminal law and penal procedure'.[35] Following the Opinion of the Committee on Economic and Monetary Affairs, the Economic and Social Committee included in the criminal scope of the directive not only the provision rendering money laundering a criminal offence, but also the reporting obligation imposed on credit and financial institutions, 'which comes under penal procedure'.[36] In view of this assertion, the Committee argued

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[31] Opinion of the Committee on Economic and Monetary Affairs and Industrial Policy for the Committee on Legal Affairs and Citizens' Rights, Rapporteur: De Donnea, DOC. A3/273/90, p.20.
[32] *Ibid.*
[33] Committee on Economic and Monetary Affairs and Industrial Policy, *op. cit.*, p.21.
[34] OJ C332, 31.12.1990, p.86, at p.87.
[35] *Ibid.*
[36] OJ C332, 31.12.1990, p.88.

that Article 57 would not be an adequate legal basis for the directive, and proposed as alternative bases Articles 100 and 100a of the Treaty (now 94 and 95 respectively), dealing with Single Market measures, or the 'catch-all' provision of Article 235 (now 308), providing that 'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'.[37] It is interesting to note that both opinions in this manner indirectly acknowledged the competence of the Community to adopt measures touching upon the sphere of criminal law.

Similar issues were raised in the discussion of the draft directive in the House of Lords. In the Memorandum submitted by a group of experts from Hull University, it was initially stated that *prima facie* Article 57 appeared to have 'very little formal link with a proposal for the establishment of common systems of criminal controls over money laundering'.[38] However, following the Commission's prominent 'Single Market' rationale, in the end they accepted the adequacy of 57(2) as a legal basis for the Directive; their objection regarding the possibility of using 57 to 'harmonise' rather than 'co-ordinate' national laws was overcome by the fact that the Treaty was not consistent in its use of the terms. They added however, that 'insofar [as] the proposal has as its object or effect the [proper] functioning of the internal market then it would also seem to come within the ambit of Article 100A'.[39]

The reasoning of the memorandum serves to illustrate the ambiguity surrounding the 'legal basis' debate. The initial unconditional assertion, in line with some of the

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[37] *Ibid.* On the development of Community law through the use of 235, see J.A.Usher (1998), *EC Institutions and Legislation,* Longman, London and New York, pp.82 *et seq.*
[38] Memorandum by Raymond Smith, David Freestone and Patrick Birkinshaw, Law School, Hull University, in House of Lords, *op. cit.*, p.32 (30-35).
[39] Memorandum by Smith *et al.*, *op. cit.*, pp.32-33.

EC Committees, that the directive extends to covering criminal law matters, is in less than one page virtually ignored in view of the emphasis placed to the Single Market *rationale* of the proposed measure. The real two-fold character of the directive is thus presented as one-sided, and is combined with a confusion regarding the means and the end, or the 'object or effect' of the directive.

The above debate led to the adoption by the Council of the Parliament's amendment, with the addition of Article 100A as a legal basis, thus taking into account 'the fact that the scope of the Directive extends beyond credit and financial institutions'.[40] Although this formula was deemed satisfactory and was included in the directive as finally adopted, the addition of 100A to embrace the 'criminal law' character of the measure is far from unproblematic. This has been particularly evident with regard to the parallel question which was raised in the preparation of the directive: that of the attribution to the Community of a criminal law competence.

IV. THE COMMUNITY AND CRIMINAL LAW IN THE MAKING OF THE DIRECTIVE

> 'The criminal law is, in a very real sense, the 'law of the land'. Our conduct is ordered by its precepts, our transgressions punished. The guilty cannot run from the 'long arm of the law'. These are questions of criminal jurisdiction at a given place and time. They concern the substantive content of the criminal law: the types of behaviour that are censured, the types of punishment and the relationship that is constructed between the two. No matter how abstract the formulation of the law, it can never be completely disembedded from social space'.[41]

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[40] European Parliament, *Recommendation of the Committee on Legal Affairs and Citizens' Rights on the COMMON POSITION established by the Council with a view to the adoption of a directive on prevention of use of the financial system for the purpose of money laundering (C3-0062/91 - SYN 254),* Rapporteur: G. Hoon, DOC. A3-0082/91, 3 April 1991, Explanatory Statement, p.8.
[41] L. Farmer (1997), *Criminal Law, Tradition and Legal Order. Crime and the Genius of Scots Law, 1747 to the Present*, Cambridge University Press, p.16.

Farmer's theorisation, as reflected in the above quotation, serves to illustrate the inextricable link of criminal law with prevailing social values in a particular social space, which the law is designed to protect. This renders criminal law a 'social, historical phenomenon, developed and applied in a particular and contradictory social world'.[42] At the same time, it highlights the role of the State in protecting these values through a mechanism of state coercion, maintaining the 'law of the land'. This creates a prominent link between criminal law and justice and state sovereignty. Through their reflection, protection and conservation of social values within and by the state mechanism, criminal law and justice become 'symbols of state sovereignty, so to speak its very core and centre-piece'.[43]

The traditional link between criminal law and state sovereignty is, as seen above, challenged by the emergence of an international criminal law, largely dealing with 'transnational crimes'.[44] One of the most serious challenges to 'national' criminal law came from the draft money laundering directive, whose proposed Article 2 called on member states to 'ensure that money laundering of proceeds from any serious crime *is treated as a criminal offence* according to their national legislation'. [45] In this manner, the Community appeared competent to prescribe criminal offences, harmonising the criminal laws of the member states, thus going beyond principles of state sovereignty.

The controversy created by the proposed Article 2 regarding the legitimacy of the Community to acquire a criminal law competence brought to the fore what has been deemed the 'rather mysterious relationship' between the European treaty framework and criminal law.[46] The exploration of this mystery has started only

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[42] A. Norrie (1993), *Crime, Reason and History*, Weidenfeld and Nicholson, London, p.33.
[43] H. Jung (1993), 'Criminal Justice - a European Perspective' in *Criminal Law Review*, p.237.
[44] See the analysis in chapter 1.
[45] Emphasis added.
[46] P.-C. Müller-Graff (1998), 'The European Treaty Framework and the Criminal Law: EC Competences in Criminal Law', in P.J.Cullen and W.C.Gilmore (eds.), *Crime Sans Frontières: International and European Legal Approaches*, Edinburgh University Press, Edinburgh, p.100.

recently, but is constantly enriched by an increasing number of contributions. [47] A useful systematisation of the relationship between criminal law and the European Community is offered by Labayle, who affirms the construction of what he calls a *'community penal space'*.[48] The evolution of this space is associated with two interrelated processes: the *'communitarisation of criminal law'*, that is of national criminal law, implying the determination by the Community of a national competence and not the exercise of a new, EC criminal law competence; in this process, the state has to take all necessary measures to comply with the Community imperatives, with possible phenomena being the 'neutralisation' of the internal criminal norm contrary to a Community norm, or, on the contrary, the effective criminalisation of Community law violations.[49] And the *'criminalisation of Community law'*, claiming the recognition of a Community criminal law competence.[50]

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[47] In addition to the aforementioned contributions by Jung and Müller- Graf, see *inter alia* : M. Delmas - Marty (1998), 'The European Union and Penal Law' in *European Law Journal*, vol.4, no.1, pp.87-115; M. Anderson *et al.* (1995), *Policing the European Union*, Clarendon Press, Oxford, especially chapter 6; H.G.Sevenster (1992), ' Criminal law and EC Law' in *Common Market Law Review*, vol. 29, pp.29-70; J. Dine (1993), 'European Community Criminal Law?' in *Criminal law Review*, pp.246-254; E. Baker (1998), 'Taking European Criminal law Seriously' in *Criminal Law Review*, pp. 361-380; H. Labayle (1995), 'L'Application du Titre VI du Traité sur l'Union Européenne et la Matière Pénale' in *Revue de Science Criminelle et de Droit Pénal Comparé*, no.1, pp. 35-64; A. de Nauw (1996), 'Le Caractère Necessaire, Opportun ou Superflu de l'Attribution de Compétences Pénales à la Communauté Européenne' inF. Tulkens et H.D. Bosly (dir.), *La Justice Pénale et l'Europe*, Bruylant, Bruxelles, pp.221-230; G.Vernimmen (1996), 'La Pénalisation du Droit Communautaire et la Communautarisation du Droit Pénal' in Tulkens and Bosly, *op. cit.*, pp.245-254; U. Sieber (1993), 'Union Européenne et Droit Pénal Européen. Proposition pour l'Avenir du Droit Pénal Européen' in *Revue de Science Criminelle et de Droit Pénal Compare*, pp.249-264; G. Dannecker (1996), 'Strafrecht in der Europäischen Gemeinschaft. Eine Herausforderung für Strafrechtsdogmatik, Kriminologie und Verfassungsrecht' in *Juristenzeitung*, 20.9., pp.869-880; K. Tiedemann (1993), 'Europäisches Gemeinschaftsrecht und Strafrecht' in *Neue Juristische Wochenschrift*, Heft 1, pp.23-31; and M. Böse (1996), *Strafen und Sanktionen im Europäischen Gemeinschafts Recht*, Carl Heymanns Verlag, Köln, Berlin, Bonn, München.

[48] *'Espace pénal communautaire'*. Labayle distinguishes it from what he calls a 'european penal space' (*espace pénal europeen*), perceived in its geographical sense. Labayle, *op. cit.*, pp.37-39. Emphasis added.

[49] Labayle, *op. cit.*, p.41. Emphasis added.

[50] *Ibid.* On a similar distinction see Vernimmen, *op. cit.*

Utilising a similar perspective, Delmas- Marty offers the distinction between *neutralisation* and *augmentation* of national penal law.[51] The augmentation of national penal law, similar but not identical to Labayle's 'communitarisation', is further distinguished in two calls: the call to treat Community interests in the same way as national interests;[52] and, with a more direct link to an express EC criminal law competence, the call to integrate the Community norm into national penal law.[53] The latter is further analysed into *integration by reference*, 'based on a - more or less broad - general clause inserted in the penal norm (the law itself or the implementing texts), and intended to incorporate Community law into national penal law'; [54] and *direct integration*, which occurs through an amendment of national criminal law, 'thus converting the Community norm into domestic law'.[55] The direct integration technique, largely associated with the existence of a Community competence in criminal law,[56] was clearly reflected in Article 2, calling on Member States to treat money laundering as a criminal offence.

These doctrinal distinctions are largely influenced by the jurisprudence of the European Court of Justice on the matter. The Court has repeatedly held that 'in principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible'.[57] However, this assertion is complemented by the acknowledgement that Community law sets certain limits to these powers.[58] A detailed discussion of the Court's case law falls outside the scope of this analysis. Schematically, however, it can be argued that the limits that

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[51] Delmas - Marty, *op. cit.*, pp.90 *et seq.* Emphasis added.
[52] Delmas - Marty, *op. cit.*, pp.102 *et seq.* According to Delmas - Marty, this integration technique does not seek to incorporate the Community norm into national penal law, but rather attempts to extend the latter' s sphere of application so as to protect Community as well as national interests' (p.102). It is further distinguished into *spontaneous similar treatment* and *imposed assimilation*.
[53] Delmas - Marty, *op. cit.*, pp.98 *et seq.*
[54] Delmas - Marty, *op. cit.*, p.98. Emphasis added.
[55] *Ibid.*
[56] Note here the distinction of Müller - Graf between competence to define criminal conduct, and competence to stipulate and impose criminal or administrative sanctions. Müller - Graf, *op. cit.*
[57] Case 203/80, *Criminal Proceedings against Guerrino Casati*, [1981] ECR 2595, at p.2618, point 27. See also case 186/87, *Cowan v. Trésor Public*, [1989] ECR 95, pp.221-222, point 19.
[58] *Ibid.*

the Court has laid down on the Member States, either through judgements or through the opinions of the Advocate General, concern:

-. Their duty to adopt legislative provisions which 'may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law'.[59]

-. Their duty on 'equivalent penalisation' established through the elaboration of the 'assimilation principle'. According to that, Member States 'must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive'.[60]

-. Their duty to respect the Community's exercise of powers 'to harmonize the criminal laws of the Member States, if that were necessary to attain one of the objectives of the Community'.[61]

It is the last, *effet utile* argument, that formed the basis for the Commission's choice of including a criminalisation provision in the draft money laundering directive. According to its Preamble, 'making money laundering a criminal offence in the Member States, although it goes beyond the scope of the financial system, constitutes a necessary condition for any action to combat this phenomenon and in particular to permit cooperation between financial institutions or banking supervisors and judicial authorities'.[62] The Commission official justified this choice in the House of Lords by asserting that 'the Community was competent to impose obligations on Member States to carry out penal action, if it deemed that

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[59] *Cowan, op. cit.*, referring to *Casati, op. cit.*

[60] Case 68/88, *Commission v. Greece,* [1989] ECR I-2965, pp.2984-85.

[61] Opinion of Advocate General Jacobs, in case C-240/90, *Commission v. Germany*, [1992] ECR I-5383, p.5408.The Court however judged that a decision on EC competence in the field of penal sanctions was not necessary. For an overview of the *effet utile* argument in the context of the imposition of sanctions by the Community, see M. Zuleeg (1999), 'Enforcement of Community Law: Administrative and Criminal Sanctions in a European Setting' in J.A.E. Vervaele (ed.), *Compliance and Enforcement of European Community Law*, Kluwer Law International, the Hague, London, Boston, pp.349-358.

[62] Recital 10.

this was necessary to obtain the full effect of the measures which it adopted'.[63] In the case of the money laundering directive, it was added, 'it was essential that Member States should adopt criminal sanctions against money laundering both to provide a sufficient deterrent and also to allow the lifting of professional confidentiality in money laundering investigations'.[64]

The granting to the Community here of an express competence to define criminal behaviour would depend on the objective of the Directive to maintain the proper functioning of the Single Market. Abetting in this context, is the argument in favour of an EC criminal law competence on the basis of Article 100a of the Treaty.[65] At a second level, it has been argued that the draft directive was 'only placing the Court's case law in legislative form', and that 'it did not seek to prescribe the nature of the criminal offence to be created or the level of the penalty which should be attached to it'.[66]

These arguments are not without objections. Regarding the second line of argumentation, it seems difficult to assert from the general wording of the directive regarding the nature or penalties of the offence that the Community did not exercise, through Article 2, an express competence to define criminal conduct. Moreover, the general reference to the placing of the Court's case law in a legislative form, is too tenuous a link for legitimising such competence. This is particularly the case should the *effet utile* argument be considered as the basis of Article 2, since it should be remembered that it is clearly expressed in an Advocate General's Opinion and not in the Court's judgement -where the Court stated that 'there is no ground ... to express a view on the Community's power in the general penal sphere'.[67] Even the authors themselves note that it is more uncertain whether

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[63] Note of Informal Discussion in Brussels with Mr. Geoffrey Fitchew in House of Lords, *op. cit.*, p.29.
[64] *Ibid.*
[65] Böse, *op. cit.*, p.68.
[66] Anderson *et al.*, *op. cit.*, p.198.
[67] *Commission v. Germany*, p.I-5431.

Community law 'may also require harmonization of national criminal laws of the Member States in order to further the objectives of the European Community'.[68]

These arguments, viewing the glass as 'half-full', can moreover be opposed by the general argument that nowhere in the Treaty, and nowhere expressly in the ECJ case-law, is there a provision or interpretation granting to the Community an express criminal law competence. This was the basis of vigorous national reactions to the draft directive's Article 2. To the argument that 'there is nothing in the Treaty of Rome or its amendments which excludes the criminal law from the ambit of EC law'[69], the answer from the United Kingdom Government was that 'such matters are outside Community competence, being for individual Member States to decide'.[70] Similar was the reaction of the *Bundesrat* in Germany, which suggested that the German Government reject Article 2 unreservedly, since the Community did not enjoy any competence to enact criminal legislation.[71]

Notwithstanding these conceptual, political and legal difficulties, a directive on prevention of the use of the financial system for the purpose of money laundering was finally adopted in a rather short time frame, in 1991. The problems regarding the competence and legal basis, and others revealed in the readings of the Commission's draft, were surpassed through a series of compromises, leaving at the same time unresolved issues that still remain open. These issues, which reflect the tension between the political pressure for the adoption of an EC -wide anti-laundering regime and inertia in political and legal integration in the Community, will be explored through an analysis of the history, content, implementation and future of the provisions of the directive.

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[68] Anderson *et al., op. cit.*, p.183.
[69] Memorandum by Smith *et al.* in House of Lords, *op. cit.*, p.30.
[70] Supplementary Evidence by HM Treasury in House of Lords, *op. cit.*, p.11.
[71] K. Magliveras (1994), 'Money Laundering and the European Communities' in J.J.Norton (ed.), *Banks: Fraud and Crime*, Lloyd's of London Press Ltd., London, New York, Hamburg, Hong Kong, p.179. See also Bundesrat, Drucksache 288/90 (Beschluss), 616th Sitting, 6.7.1990. For a summary see (1990) *Europäische Zeitschrift fur Wirtschaft*, vol.1, p.368.

2. THE EC MONEY LAUNDERING DIRECTIVE: THE CONTENT

I. *RATIONALE*/SECURITISATION

The money laundering directive as finally adopted[72] is accompanied by a lengthy preamble which provides a detailed policy justification for the measure. In line with the pre-existing international instruments in the field, the necessity for the anti-money laundering legislation is justified through a process of securitisation, perceiving money laundering as an eminent, multi-faceted threat.

Following the spirit of the Basle Declaration,[73] the Preamble acknowledges that 'when credit and financial institutions are used to launder proceeds from criminal activities..., the soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardised, *thereby losing the trust of the public'*.[74] Through the recourse to the emotionally charged concept of public trust, coupled with the implication of banker's complicity in the money laundering process,[75] the latter is viewed as a threat to both individual institutions and the financial system in general.

This threat discourse obtains a further dimension in view of the establishment of the internal market as a key concept of European integration. The Preamble raises the concern that lack of Community action in the field 'could lead Member States, for the purpose of protecting their financial systems, to adopt measures which could be inconsistent with completion of the Single Market'.[76] In the EC context money laundering is thus viewed as affecting not only the financial system as a

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[72] Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L166, 28.6.1991, p.77.
[73] See chapter 2.
[74] Recital 1. Emphasis added.
[75] For a detailed account of the justification of duties incumbent on the financial sector, see chapter 5.
[76] Recital 2.

whole, but also the very establishment and functioning of the Single Market, thus being elevated to an existential threat to European integration. Anti-money laundering measures are justified because of this threat, which is at the same time reinforced by the very characteristics of the Single market *per se*![77] As the Preamble then states, 'launderers could try to take advantage of the freedom of capital movement to supply financial services which the integrated financial area involves, if certain co-ordinating measures are not adopted at Community level'.

The directive is however not solely justified by reference to market considerations. These are coupled with the acknowledgement of the influence of money laundering on the rise of drug trafficking and organised crime. It is thus put forward that combating money laundering 'is one of the most effective means of opposing this form of criminal activity, which constitutes a particular threat to Member States societies'.[78] Echoing again previous international initiatives,[79] the securitisation discourse expands here dramatically to conceptualise money laundering as a threat, through its linkage with organised crime, to an object as wide and undefinable as the social fabric, or society as a whole.[80]

II. THE STRATEGY

In line with its justification on the basis of both criminal policy and market considerations, the money laundering directive reflects the combination of both the active and defensive strategies employed to counter the phenomenon.[81] On the active front, the directive contains a provision prohibiting money laundering.[82] This follows the acknowledgement in the Preamble that money laundering must be combated mainly by penal means.[83] Following its market protection *rationale*, the

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[77] *Ibid.*
[78] Recital 3.
[79] See chapter 2.
[80] On the perception of organised crime as a threat to the social fabric, see chapter 1.
[81] On a general overview of the strategies see chapter 2.
[82] Article 2. On the controversy over criminalisation see part 1.
[83] Recital 4.

Preamble further states that a penal approach should not be the only way to combat money laundering, 'since the financial system can play a highly effective role.'[84] Along with prohibition of money laundering, the directive thus contains a series of provisions establishing duties that credit and financial institutions must undertake in the fight against the phenomenon.

The combination of criminalisation and prevention policies in the money laundering directive reflects the acknowledgment of the close interrelation of the goals of penal deterrence and protection of the integrity of the financial system.[85] At the same time, it renders the directive a unique piece of legislative drafting in relation to prior international instruments in the field, as they were focusing primarily either to the criminal law sphere, like the UN and Council of Europe Conventions, or in the preventive sphere, like the FATF and Basle Committee initiatives.[86]

The directive draws substantially upon all these instruments in constructing an anti-money laundering framework embracing both prevention and control. The legal basis of the measure was finally stated to have been articles 57(2) first and third indent, related to the freedom of establishment, and article 100A, related to the internal market.[87] While these provisions seem to provide an adequate legal basis for the preventive part of the directive, the picture becomes more blurred in

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[84] Recital 5.

[85] See chapter 2.

[86] It must be noted however that the 40 FATF Recommendations also contained provisions on money laundering criminalisation and confiscation. On an overview of these international initiatives, see chapter 2. The commitment of the Community in applying the United Nations and Council of Europe Conventions is reflected in the political statement by the representatives of the member states governments meeting within the Council. As seen above, this statement serves to counter-balance the non-inclusion of a specific money laundering criminalisation clause in the directive, as the governments undertook to take all necessary steps by 31.12.1992 at the latest to enact criminal legislation enabling them to comply with their obligations under the Conventions. According to the recent Commission Report on the implementation of the directive, all member states have signed and ratified the Vienna Convention and implemented its relevant provisions. The situation is not as uniform regarding its Strasbourg counterpart, as all member states are signatories, but some of them had not yet ratified it at the time of the report. See *Commission of the European Communities, Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive*, COM(1998)401 final, Brussels, 1.7.1998, annex 3.

relation to the inclusion of a provision with a deterrence/crime control logic in it. As seen above,[88] this mirrors thorny issues of EC competence, which, in the case of the money laundering directive, have been addressed through a compromise: namely, prohibiting but not criminalising the phenomenon.

III. THE PROHIBITION OF MONEY LAUNDERING

In view of stern resistance by a number of Member States, the final version of article 2 states that Member States shall ensure that money laundering as defined in the directive is prohibited. At the same time, the directive was accompanied by a political statement by the representatives of the Governments of the Member States, undertaking to take all necessary steps by 31 December 1992 at the latest to enact criminal legislation enabling them to comply with their obligations under the directive, and also the UN and Council of Europe Conventions. By non-legal means, and notwithstanding the absence of express wording in the directive, money laundering has been *de facto* criminalised in all EC member states.[89]

But how exactly is money laundering defined? According to article 1, third indent of the directive, it means the following conduct when committed intentionally:

- the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action
- the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such

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[87] On the controversy see part 1.
[88] See part 1.
[89] See Commission of the European Communities, *First Commission's report on the implementation of the Money Laundering Directive (91/308/EEC) to be submitted to the European Parliament and to the Council*, COM 95(54) final, p.4.

property is derived from criminal activity or from an act of participation in such activity

- the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity
- participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.

The directive thus reirerates in identical wording the money laundering definition put forward by the Vienna Convention.[90] This definition includes not only conduct that conforms to the concept of money laundering as a process, but also conduct that is similar to pre-existing receiving offences and participation, association and attempt in relation to both forms of conduct. As the two last indents were not included in the Commission's initial proposal,[91] it is evident that the finally adopted text constitutes an attempt to put forward a considerably broadened money laundering definition.

In line with both the Vienna and Strasbourg Conventions, the directive characterises money laundering as intentional. According to all three instruments, the intentional element, along with the elements of knowledge and purpose, which are central in the definition of money laundering, 'may be inferred from objective factual circumstances'.[92] The directive did not follow the choice of the Strasbourg Convention to open up the possibility for the prohibition of negligent laundering.[93] It followed however the latter in extending the territorial scope of money

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[90] Articles 3(1)b(i), 3(1)b(ii), 3(1)c(i), 3(1)c(iv) respectively.

[91] Commission of the European Communities, *Proposal for a Council Directive on prevention of use of the financial system for the purpose of money laundering*, COM(90)106 final-SYN 254. See also note 19.

[92] Article 1, indent 3 of the directive; article 3(3) of the Vienna Convention; and article 6(2)(c) of the Strasbourg Convention.

[93] Article 6(3)(a) of the Strasbourg Convention provides that each party to it may adopt such measures as it considers necessary to establish also as offences under its domestic law cases, *inter*

laundering to activities which generated the laundered property that were perpetrated in the territory of another member state or in that of the third country.[94] This is a welcome addition to the directive proposal, acknowledging the transnational character of the money laundering process and essential in order to ensure the effectiveness of the provision.

Another element which broadens considerably the scope of the money laundering definition is the interpretation of the notion of property: following again the Vienna Convention,[95] the directive states that property means 'assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interests in such assets'.[96] This all-encompassing definition has the potential, as will be seen below, to be a source of great legal uncertainty and broaden the scope of money laundering to include an overextended range of transactions.[97]

The last, but vital, element in the definition of money laundering concerns the delimitation of the offences from which the laundered property emanates. This has been a matter of controversy in the drafting of the directive. The Commission included in its initial proposal a reference to property from 'serious crime', further elaborated as 'a crime specified in Article 3, paragraph 1(a) and (c) of the Vienna Convention, terrorism and any other serious criminal offence (including in particular organised crime), whether or not connected with drugs, as defined by the Member States'. [98] The Commission's approach thus lay somewhere in the middle of the road between the UN Convention, where money laundering is limited to proceeds of drug trafficking, and the Council of Europe Convention, with the potential to include 'any predicate offence'. The Commission tried to limit the

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alia, where the offender ought to have assumed that the property was proceeds of crime. See chapter 2. For a detailed analysis on the criminalisation of negligent laundering, see chapter 4.

[94] Article 1, indent 3 *in fine*.

[95] Article 1q.

[96] Article 1, indent 4.

[97] For a detailed analysis see chapter 4.

[98] Article 1, indent 5.

predicates in accordance with the seriousness of the offence, while leaving its scope open to include a broad list of offences.

The recourse to the abstract notion of serious crime was heavily criticised in the subsequent readings of the directive. The Economic and Social Committee in its opinion criticised the term as too vague, asserting at the same time that 'it is not the job of credit institutions to become auxiliaries of the police, the legal authorities or the administrations responsible for dealing with such things as tax frauds, with all the risks of error or diversion that this would involve'.[99] In a similar vein, the European Parliament rejected the Commission's wording and put forward instead an exhaustive list of predicate offences including, along with drug offences under articles 3(1)(a) and 3(1)(c) of the Vienna Convention, terrorism, organised crime, illicit arms trading, counterfeiting, traffic in persons, the exploitation of the prostitution of others, kidnapping and hostage taking, as defined by the member states.[100]

These reactions resulted in the amendment of the Commission's proposal. In the final text the reference to 'serious crime' has been replaced by the more objective term of 'criminal activity'. According to the fifth indent of article 1, this means 'a crime specified in Article 3(1)(a) of the Vienna Convention and any other criminal activity designated as such for the purposes of this Directive by each Member State'. The directive thus adopted a minimum standard approach, by confining money laundering at least to the proceeds from drug offences as specified in the Vienna Convention. Member states are however given the discretion to broaden the scope of the legislation by adding further predicates to the offence. The limited and compromising character of this approach has also been strongly criticised[101] and

[99] OJ C332, 31.12.1990, p.86 at p.88.
[100] See note 29.
[101] As Levi has pointed out, 'there is a certain irony in what is plainly a political compromise between Member States, insofar as the Directive will apply mandatorily to the proceeds of drug trafficking but not to the proceeds of fraud against the European Community', as 'the latter is surely more central to Community competence than is the former'. M. Levi (1994), 'Money Laundering,

has led in practice to considerable discrepancies in the implementation of the directive as some states have opted for the inclusion of long, exhaustive lists of predicate offences,[102] while others have chosen to criminalise the laundering of proceeds on an all-crime basis.[103] A tendency to broaden the scope of the offence can however be clearly discerned in national laws. Criminalisation solely of drug money laundering has been gradually abolished, and an increasing number of states have opted for the extension of the predicates to all crimes.[104]

IV. THE DUTIES OF CREDIT AND FINANCIAL INSTITUTIONS

A. Scope *ratione personae*

The preventive strategy in combating money laundering is reflected in the establishment by the directive of a series of duties imposed on a wide range of credit and financial institutions. The directive makes explicit reference to the two general EC banking directives in order to define credit[105] and financial[106] institutions: according to the first indent of Article 1 of directive 77/780/EEC,[107] as amended by directive 89/646/EEC,[108] a credit institution is 'an undertaking whose business is to receive deposits or other repayable funds from the public and to grant

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Legislation and fraud' in J. Norton (ed.), *op. cit.*, p.43. As will be seen below, the situation has been changed by the new draft Commission money laundering directive amending the existing one.

[102] See for instance Greece, where article 1 of law 2331/1995 on the prevention and control of money laundering (24 August 1995, FEK 173), defines as criminal activity the following offences: trafficking in drugs and weapon, robbery, blackmail, kidnapping, serious larceny, embezzlement or fraud, illegal trade in antiquities, theft of cargo of a vessel, illegal trade in human tissue and organs, smuggling, nuclear crime, prostitution and illegal gambling.

[103] See for instance France, where law 96/392 of 13 May 1996 on the fight against money laundering and drug trafficking and international co-operation in matters of seizure and confiscation of products of crime, extends, in new article 324-1, the scope of money laundering to cover the proceeds of all crimes ('*crimes*' or *délits*').

[104] For a detailed overview, see Commission,1998, annex 4.

[105] Article 1, indent 1.

[106] Article 1, indent 2.

[107] First Council Directive of December 12, 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ L322, 17.12.1977, p.30 (First Banking Directive).

[108] Second Council Directive of December 15, 1989, on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of business of credit institutions and amending Directive 77/780, OJ L386, 30.12.1989, p.1 (Second Banking Directive).

credits for its own account'. Financial institutions on the other hand are defined as undertakings other than credit institutions whose principal activity is to carry out one or more of the operations included in numbers 2 to 12 and 14 of the list annexed to the Second Banking directive.[109] The definition also includes insurance companies duly authorised in accordance with the relevant directive[110] in so far as they carry out activities covered by that directive. The directive also applies to branches of credit and financial institutions located in, but having their head offices outside the Community.[111] The establishment of such an extraterritorial reach is essential for the uniform applicability of the directive provisions, as diverging standards are avoided.

It is evident thus that the directive applies to an extensive range of institutions engaged in a variety of financial activities. As was noted by the Commission, 'from the point of view of comparative law, the Money Laundering Directive is outstanding in this regard'.[112] The provisions have been implemented in an extensive manner by the member states, covering in principle the whole of the financial system.[113] Major problems appeared only in relation to the effective application of the directive to *bureaux de change*,[114] but, according to the

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[109] The list includes: lending; financial leasing; money transmission services; issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts); guarantees and commitments; trading for own account or for account of customers in: (a) money market instruments, (b) foreign exchange, (c) financial futures and options, (d) exchange and interest rate instruments, (e) transferable securities; participation in share issues and the provision of services related to such issues; advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings; money broking; portfolio management and advice; safekeeping and administration of securities; safe custody services.

[110] Directive 79/267/EEC, First Council Directive 'on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of life assurance', OJ L 63, 13.3.1979, p.1, amended by directive 90/619/EEC, OJ L330, 29.11.1990, p.50.

[111] Article 1, indents 1 and 2 *in fine*.

[112] Commission of the European Communities, 1995, p.7.

[113] *Ibid.*

[114] The problems were related to the lack of effective supervision of these institutions. As the Commission has noted, since the scope of the directive includes 'some kinds of financial institutions which are not subject to supervision on prudential basis (i.e. bureaux de change) most Member States have still to make arrangements in order to ensure effective application of the Directive to these institutions'. 'It is clear', the report went on, 'that the simple inclusion of such institutions into the scope of the legislation does not by itself suffice to secure the application of the money laundering provisions'. *Ibid.*

Commission's recent report they have been largely surpassed.[115] The same report, in line with FATF Recommendation no 8,[116] called for member states to pay careful attention and take similar action in cases of other financial activities which are not adequately regulated.

B. The duties

i. The 'know your customer' principle: customer identification and record keeping

A central element of the preventive anti-money laundering framework is the knowledge by the institutions concerned of the identity of their customers and the transactions that were executed during their relationship.[117] To achieve this level of knowledge, the directive imposes on credit and financial institutions a dual set of obligations: the duty to identify their customers and the corollary duty to keep records of identification and transactions. These provisions were largely based on relevant detailed FATF recommendations.[118]

The duty of credit and financial institutions to require identification of their customers is established in article 3 of the directive, according to which identification is required 'by means of supporting evidence' in the following cases:

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[115] Commission of the European Communities, 1998, pp.7-8. According to the report, virtually all member states have subjected *bureaux de change* to some sort of official supervision.

[116] Amended Recommendation no 8 (formerly no 9), includes a new indent stating that: 'Even for those non-bank financial institutions which are not subject to a formal prudential supervisory regime in all countries, for example, bureaux de change, governments should ensure that these institutions are subject to the same anti-money laundering laws or regulations as all other financial institutions and that these laws or regulations are implemented effectively'.

[117] For more on the justification of the duty see chapter 5.

[118] Especially recommendations 12 to 14 (now 10 to 12) 'on customer identification and record keeping rules'.

i. When entering into business relations with the customer, particularly when opening an account or savings accounts, or when offering safe custody facilities.[119]

ii. With customers other than those referred to above (in 'one-off' transactions), to any transaction involving a sum amounting to ECU 15000 or more, whether the transaction is carried out in a single operation or in several operations which seem to be linked.[120]

iii. Wherever there is suspicion of money laundering, regardless of the amount of the transaction.[121]

iv. In the event of doubt as to whether the customers are acting on their own behalf, or where it is certain that they are not acting on their own behalf. In these cases, the institutions concerned shall take reasonable measures to obtain information as to the real identity of the persons on whose behalf those customers are acting.[122]

Such identification duties are however subject to a series of exceptions. According to article 3, exceptions arise in cases of:

i. insurance policies written by insurance undertakings within the meaning of Directive 79/267/EEC (life insurance undertakings), where they perform activities which fall within the scope of that Directive, where the periodic premium amount or amounts to be paid in any given year does or do not exceed ECU 1000 or where a single premium is paid amounting to ECU 2500 or less.[123]

ii. (in the discretion of the member states): insurance policies in respect of pension schemes taken out by virtue of a contract of employment or the

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[119] Article 3(1).

[120] Article 3(2). The article also provides that, where the sum is not known at the time when the transaction is undertaken, the institution concerned shall proceed with identification as soon as it is apprised of the sum and establishes that the threshold has been reached.

[121] Article 3(6).

[122] Article 3(5).

[123] Article 3(3). However, the provision continues, identification shall still be required if the periodic premium amount or amounts to be paid in any given year is or are increased so as to exceed the ECU 1000 threshold.

insured's occupation, provided that such policies contain no surrender clause and may not be used as collateral for a loan.[124]

iii. Credit and financial institutions, where the customer is also a credit and financial institution covered by the directive.[125]

It is thus evident that the directive imposes a broad identification duty, extending beyond regular business relations and covering also one-off transactions, beneficial ownership cases and any instance where there is suspicion of money laundering. The exemptions to the rule refer to operations with a very low risk of money laundering, in the case of insurance undertakings, or are based on equivalence principles in the Single Market.[126] The directive took particular care to include identification in cases where several operations seem to be linked, a duty which, as Gilmore notes, 'is specifically designed to discourage the structuring of transactions, or "smurfing", in an effort to evade the identification obligation'.[127]

While a broad identification duty is established, no reference is made to specific identification methods, with the directive requiring in general customer identification 'by means of supporting evidence'.[128] Following the approach taken by the FATF in the matter,[129] the directive thus leaves a large margin of discretion to the member states regarding the implementation of the measure, resulting in a certain diversity[130] in national legislation. According to Gilmore, this approach is

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[124] Article 3(4). In both the cases of paragraphs 3 and 4, member states may provide that the identification requirements are fulfilled when it is established that the payment for the transaction is to be debited from an account opened in the customer's name with a credit institution subject to the directive according to the requirements of paragraph 1 (article 3(8)).
[125] Article 3(7).
[126] Commission, 1995, p.10.
[127] W.C. Gilmore (1999), *Dirty Money: The Evolution of Money Laundering Countermeasures*, 2nd edition, Council of Europe Publishing, p.161.
[128] Article 3(1).
[129] According to FATF recommendation 12 (now 10), identification is based 'on the basis of an official or other reliable identifying document'.
[130] On a detailed analysis of the issues surrounding the implementation of the identification duty, see chapter 5.

justified in view of the 'diverse range of factual situations which are presented in practice'.[131] His analysis of examples is worth quoting at length:

'For example identification procedures for personal customers when opening accounts may need to be varied depending on whether the individual is resident or non-resident. Different considerations may apply in relation to the opening of "trust" accounts. An even greater range of possibilities will need to be catered for in the opening of accounts for legal persons.'[132]

In spite of its broad wording, the identification rule has proven to be much less problematic than the provisions designed to extend and to qualify it. Article 3(5), largely based on FATF Recommendation 13,[133] establishes a duty to identify beneficial owners. The directive offers minimal guidance through an abstract reference to 'reasonable measures' to obtain identification in these cases. The wording was identical in the Commission's draft and heavily criticised during its the readings,[134] since it has the potential to result in differences in the implementation of the provision and to place a considerable burden for the institutions concerned.[135]

While no particular problems appeared in relation to the exemption provisions, a series of issues have been raised by the choice of a number of member states to extend the application of article 3(7), exempting credit and financial institutions from their identification duty when the customer is another institution of that kind

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[131] Gilmore, *op. cit.*, p.161.
[132] *Ibid.*
[133] Recommendation 13 (now 11), reads as follows: Financial institutions should take reasonable measures to obtain information about the true identity of the persons on whose behalf an account is opened or a transaction conducted if there are any doubts as to whether these clients or customers are acting on their own behalf, for example, in the case of domiciliary companies (i.e. institutions, corporations, foundations, trusts, etc. that do not conduct any commercial or manufacturing business or any other form of commercial operation in the country where their registered office is located).
[134] The Economic and Social Committee in its Opinion stated that 'establishing the real identity of the persons on whose behalf an operation is carried out or an account is opened when customers are not acting on their own behalf poses technical problems of application which the draft Directive certainly set out' and emphasised the need to find a way 'to clear up this lack of precision which opens the door to all sorts of disorder when the Member States apply the rules'. See note 99.

covered by the directive, to include non-EC and EEA institutions. This has happened in the case of the United Kingdom and Luxembourg, requiring the institutions concerned to be subject to equivalent obligations to the directive, and the Netherlands, where the Government is empowered to exonerate other categories of institutions.[136] This choice has been heavily criticised in view of its potential to undermine the standards set out by the directive by creating a major loophole to the identification requirements, especially in view of the difficulty in assessing 'equivalence' of anti-money laundering standards.[137]

The identification duty is complemented by the obligation of credit and financial institutions to keep records of the following, in order to be used as evidence in any money laundering investigation:

i. in the case of identification, a copy or the references of the evidence required

ii. in the case of transactions, the supporting evidence and records, consisting of the original documents or copies admissible in court proceedings under the applicable national legislation.[138]

Following FATF Recommendation 14 (now 12), the directive states that records must be maintained for a period of at least five years after the end of the relationship with the customer and the execution of the transactions respectively.

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[135] It is interesting to note that neither of the Commission reports on the implementation of the directive contains an extensive reference to the implementation of article 3(5). For a detailed analysis of issues related to identification in cases of beneficial ownership, see chapter 5.

[136] Commission, 1995, p.10.

[137] Highly critical of this development, Gilmore, largely based on the 1995 Commission report, notes: 'Leaving aside the question of the legal justification (if any) for such initiatives, the wisdom of this approach is open to serious question. Take the issue of the identification of states with "equivalent" countermeasures. Clearly the mere utilisation of the list of FATF members would present considerable difficulties since not all of those countries have fully implemented the recommended countermeasures. The possibility of the EU reaching agreement on a common list of countries whose money laundering countermeasures could be regarded as being equivalent to those contained in the directive has been regarded thus far as being remote. It has also been felt that, even if such a consensus did emerge, it would have to be revisited with some frequency to take account of developments in terms of
implementation in many countries around the globe'. Gilmore, *op. cit.*, p.163.

[138] Article 4.

Regarding the quality of the records, the text of the directive is not as general as the FATF measure, which provides that 'such records must be sufficient to permit reconstruction of individual transactions...so as to provide, if necessary, evidence for prosecution of criminal behaviour'. The directive links the evidentiary value of the files only to money laundering investigations. This, along with the clear wording related to the nature of the files, render the provision one of the most straightforward in the directive.

ii. The duties of co-operation: suspicious transaction reporting and related duties

a. Suspicious transaction reporting

The cornerstone of the preventive anti-money laundering framework set out by the directive is article 6, which establishes the duty of credit and financial institutions to report to the authorities which are responsible for combating money laundering in the territory where they are situated. This duty is analysed in a two-fold manner, with the institutions concerned being under:

-. An 'active' duty to inform these authorities, on their own initiative, of any fact which might be an indication of money laundering; and

-. A 'passive' duty to furnish those authorities, at their request, with all necessary in formation, in accordance with the procedures established by the applicable legislation.

While the 'passive' duty is similar to pre-existing national laws establishing an exception to the duty of confidentiality on grounds of public policy and crime prevention, the 'active' duty, which puts forward a system of proactive reporting of suspicious transactions by credit and financial institutions is certainly a novelty.[139] This duty is viewed as an essential part of the co-operation mechanisms set out

[139] For a detailed analysis of this change and its implications, see chapter 5.

between the public and private sector in the fight against money laundering.[140] It is important to note here that the directive was more daring in this respect than FATF Recommendation 16, which provided that 'if financial institutions suspect that funds stem from a criminal activity, they should be *permitted or required* to report promptly their suspicions to the competent authorities'.[141] The stricter option of the directive to render reporting mandatory was subsequently followed by the FATF and in 1996 the term 'permitted' was deleted from the text of the Recommendation (now no 15).

Article 6 leaves a great margin of discretion to member states regarding the modalities of the reporting of suspicions. This has led to a number of discrepancies in subsequent national laws. The most notable of these has been the emergence of two distinct reporting systems: a system, followed in the majority of the member states, of suspicious transaction reporting, where the institutions concerned assess transactions in a subjective manner; and a system, followed in the Netherlands, of reporting not suspicious, but unusual transactions. The latter constitutes an attempt to establish objective criteria, in the form of indicators, in the reporting process.[142]

Another potential source of implementation differences is the second paragraph of article 6. Going a step further than the FATF, the paragraph provides *inter alia* that 'information supplied to the authorities in accordance with the first paragraph may be used only in connection with the combating of money laundering'. This was a welcome addition to the Commission's draft which was put forward by both the Economic and Social Committee[143] and the European Parliament.[144] It

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[140] According to recital 15 of the directive Preamble, 'preventing the financial system from being used for money laundering is a task which cannot be carried out by the authorities responsible for combating this phenomenon without the co-operation of credit and financial institutions and their supervisory authorities'.

[141] Emphasis added.

[142] For a detailed analysis, see chapter 5.

[143] The Committee proposed the inclusion of a new article stating that 'the information gathered by the judicial or law enforcement authorities may not be used for any purposes other than those laid down in this Directive'. See note 99.

[144] In the first reading of the draft the Parliament added in what was then article 5 a new paragraph 2b, providing that 'information supplied to the authorities in accordance with paragraph 1 may be

acknowledges the invasiveness of the reporting duty and the need to limit the use of a torrent of data relating to every day transactions generated by article 6 only to cases where it is absolutely necessary. In the final text of the directive, however, such concerns are compromised by the push to broaden the scope of the provision: its final indent states that member states 'may provide that such information may also be used for other purposes'. In this manner, the door opens to the possibility of an over-extensive use of suspicious transaction reports, in a far from harmonised system of information exchange both in member states and at the EU level.[145]

b. Due diligence

A corollary of the duty to report suspicious transactions is the obligation of credit and financial institutions to demonstrate due diligence in their transactions. Article 5 thus places the institutions concerned under the duty to 'examine with special attention any transaction which they regard as particularly likely, by its nature, to be related to money laundering'. According to the Explanatory Memorandum accompanying the Commission's draft directive, this provision is a consequence, expressed in a negative way, of the general co-operation principle, as well as 'an exigency of the financial institutions' responsibility in order to preserve their own soundness and integrity'.[146] The duty extends the scope of co-operation beyond suspicious transaction reporting: according to the Commission, it is a 'previous and necessary' condition of reporting and therefore comes into play 'when there is not yet specific suspicion of money laundering'. [147]

The due diligence duty reflects the considerations behind FATF Recommendations 15 (now 14) and 21. According to the former, financial

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used only in connection with preliminary judicial inquiries into serious crimes within the meaning of this directive'. See note 29.

[145] For a detailed analysis, see chapter 6.

[146] Commission, *op. cit.* According to the Memorandum, this justification also applies to the duty to refrain from executing transactions, which was included, in the draft directive, in the same provision as the due diligence duty.

[147] Commission, 1995, p.12.

institutions 'should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose'. Recommendation 21, on the other hand, calls for special attention to business relations and transactions involving countries which do not or insufficiently apply the FATF anti-money laundering standards.[148]

The wording of these Recommendations was largely reiterated in article 4 of the draft directive, placing credit and financial institutions under the duty to 'examine with special attention any unusual transaction not having an apparent economic or visible lawful purpose'.[149] In both cases, an attempt is made to establish an 'objective' model of due diligence, with the introduction of the concept of 'unusual transactions'.[150] However, the elliptical definition of what constitutes an unusual transaction, coupled with the rather vague criterion of lack of 'an apparent economic or visible lawful purpose', caused a series of reactions related to the absence of legal certainty and the potential of the provision to impose a heavy burden on the institutions concerned.[151]

This in turn led to the drastic revision of the provision, which, in the final directive text establishes a subjective test by focusing on transactions which the institutions themselves regard as related to money laundering, while the objective element is maintained to some extent by the reference to the equally vague term of the 'nature' of the transactions concerned. Any reference to unusual transactions however has been omitted.

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[148] On the dual justification of the provision, see also Gilmore, *op. cit.*, p.165.
[149] Commission, *op. cit.*
[150] On the use of the term at the level of suspicious transaction reporting, see chapter 6.
[151] In this context, the Economic and Social Committee called on banking practice to resolve the issues created by the article, while the Parliament changed the wording slightly to include 'any unusual transaction and/or any transaction not having an apparent economic or visible lawful purpose'. *Op. cit.*

The 'open-textured' nature of the wording of the provision,[152] along with the lack of further specifications regarding the content of the duty[153] have resulted in considerable differences in implementation. While some member states require for instance the recording of the characteristics of the obligation in writing, others, in contrast with the FATF Recommendations, do not. At a more systematic level, while the provision has been explicitly transposed through specific articles in some member states, others have not explicitly done so, 'apparently because the principle of enhanced diligence is implicitly encompassed in the implementation of other provisions of the Directive'.[154] According to the Commission, such differences should not constitute a major difficulty provided there is proper supervision of the adequacy of internal control procedures.[155] However, major issues still remain with regard to the exact delimitation of the role of credit and financial institutions in exercising due diligence.[156]

c. Refraining from transactions

In Article 4 of the Commission's draft, the due diligence obligation was accompanied by the duty of credit and financial institutions to refrain from entering into any transaction which they have reason to suspect may have any relation to money laundering. The two duties are closely related as they are both viewed, as mentioned above, as the 'negative' side of the duties of co-operation set out by the directive. Along with a broad duty of diligence, the Commission defined the duty to refrain in an absolute manner.

This provision was substantially modified in the final text of the directive. The basic outline of the duty is similar to the draft: article 7 places credit and financial

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[152] Gilmore, *op. cit.*
[153] The directive has not followed FATF Recommendation 14 in this respect, which adds that 'the background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies'.
[154] Commission, 1995, p.12.
[155] Commission, 1995, p.13.
[156] For a detailed analysis, see chapter 5.

institutions under the duty to refrain from carrying out transactions which they know or suspect (rather than 'have reasons to suspect', as in the draft) to be related to money laundering. However, the provision inserts a new and important element, which is the co-operation of the institution concerned with the authorities responsible for combating money laundering: the institution must refrain from the transaction until they have apprised the competent authority which may give instructions not to execute the operation.

The non-execution of the transaction is not however an absolute rule. In another important addition to the draft, article 7 provides that, even in cases where a transaction is suspected of giving rise to money laundering, the institution may not refrain, but apprise the authorities immediately afterwards. This may happen when refraining from such a transaction 'is impossible or likely to frustrate efforts to pursue the beneficiaries of a suspected money laundering operation'. In this manner, the directive, in contrast with the original proposal, provides a flexible provision designed to accommodate investigative needs.[157]

d. Tipping off

A duty which is closely associated with the reporting and refraining obligations is the duty of credit and financial institution not to 'tip off'. According to article 8, the institutions concerned, but also their directors and employees, 'shall not disclose to the customers concerned nor to other third persons that information has been transmitted to the authorities in accordance with Articles 6 and 7 or that a money laundering investigation is being carried out'. This broad provision is based on FATF Recommendation 17, but it is more extensive in the sense of establishing an absolute duty not to tip off, extending also to third persons.[158]

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[157] Gilmore, *op. cit.*, p.166.

[158] Recommendation 17 reads as follows: Financial institutions, their directors, officers (term added in the 1996 amendment) and employees should not, or, where appropriate, should not be allowed to, warn their customers when information relating to them is being reported to the competent authorities'.

e. Facilitating factors: Exoneration from liability

Most of the aforementioned provisions impose on the institutions falling within the scope of the directive extensive and completely novel duties in the realm of crime prevention, which depart greatly from well established principles of banking and finance law, such as bank secrecy.[159] In order to soothe the fears of the private sector in this respect and assure them that their compliance with the directive will not lead to the breach of their duties to the customers, the directive includes a provision establishing the exoneration of credit and financial institutions from liability when they report or refrain from transactions. According to article 9:

> ' The disclosure in good faith to the authorities responsible for combating money laundering by an employee or director of a credit or financial institution of the information referred to in Articles 6 and 7 shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the credit or financial institution, its directors or employees in liability of any kind'.

The exoneration from liability, perceived by the Commission as 'a legal consequence of the duty of cooperation established by the Directive',[160] is largely based on FATF Recommendation 16.[161] In the case of the directive the exoneration is absolute in the sense that it covers liability 'of any kind', rather than criminal or civil liability. This places the protection of customers in cases of wrongful disclosure under serious jeopardy, as the provision is silent on the delimitation of

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[159] For an extensive analysis, see chapter 5.

[160] Commission, 1995, p.14.

[161] Which also contained, prior to its amendment, a call for suspicious transaction reporting and whose second indent read as follows: '...there should be legal provisions to protect financial institutions and their employees from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report in good faith, in disclosing suspected criminal activity to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred'. In its amended version, Recommendation 16 contains only the exoneration clause, which applies to financial institutions, their directors, officers and employees.

liability in these cases.[162] The image becomes more blurred in view of the use of the abstract concept of 'good faith'. As no guidance is given in the directive, the implementation of the provision has been far from uniform, with a number of countries extending the application in cases of negligence[163] and some having amended the relevant national provisions in an effort to strike the right balance.[164] In any case, the concept of good faith is an open-ended legal term being constantly subject to a wide range of potential interpretations by the judiciary.

iii. Organisational duties: the establishment of internal control and awareness mechanisms

The duties of credit and financial institutions are complemented by a general organisational obligation to establish internal control and awareness mechanisms within them. According to article 11, institutions must:

-. Establish adequate procedures of internal control and communication in order to forestall and prevent operations related to money laundering; and

-. Take appropriate measures so that their employees are aware of the directive's provisions, including participation of employees in special training programmes to help them recognise operations which may be related to money laundering as well as to instruct them as to how to proceed in such cases.

The establishment of this duty is deemed essential to ensure that the institutions involved will exercise the unprecedented and highly invasive duties imposed by the directive in an effective manner.[165] Article 11 mirrors to a great extent FATF

[162] For a detailed analysis, see chapter 5.
[163] Commission, 1995, *op. cit.*
[164] See for instance the example of Finland in chapter 5 below.
[165] See also Gilmore, *op. cit.*, p.166.

Recommendation 20 (now 19),[166] being rightly more detailed regarding the content of the training programmes. However, as Gilmore has noted, it is 'silent on such fundamental practical issues as the type of system to be introduced and the responsibilities of those within it'.[167] This lack of precision along with the sometimes draconian penalties for the non- or inadequate implementation of the provision raise a series of important issues of legal certainty and compliance by the institutions concerned.[168]

iv. Sanctions

The provisions imposing this wide range of duties on credit and financial institutions are complemented by an article aiming at ensuring their effective application. Article 14 calls on the member states to take appropriate measures to ensure full application of its provisions and in particular to determine the penalties to be applied for infringement of the measures adopted on the basis of them. In view of the controversy regarding the existence of a Community competence in criminal law matters, the directive is deliberately silent regarding the nature of the sanctions to be imposed. This has led to considerable differences in member states: while the majority of countries opted for administrative penalties in the form of fines, others, such as the United Kingdom, Ireland and the Netherlands, opted for the imposition of criminal law penalties for breach of the directive provisions.[169] Along with the questionable effectiveness of such draconian measures in creating a comprehensive anti-money laundering framework, important issues arise with

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[166] 'Financial institutions should develop programs against money laundering. These programs should include, as a minimum:
(i) the development of internal policies, procedures and controls, including the designation of compliance officers at management level, and adequate screening procedures to ensure high standards when hiring employees;
(ii) an ongoing employee training programme
(iii) an audit function to test the system

[167] Gilmore, *op. cit.*

[168] In the context of the implementation of the directive in the United Kingdom, see the analysis in chapter 5.

[169] For a comprehensive list of member state implementation, see annex 7 of the 1995 Commission report.

regard to their proportionality to the infraction committed.[170] Both principles of effectiveness and proportionality, along with the principle of dissuasion, must, according to the Commission, be respected in the imposition of sanctions under article 14.[171]

3. CURRENT DEVELOPMENTS: THE EXTENSION OF THE SCOPE OF THE DIRECTIVE

I. EXTRATERRITORIAL ISSUES

As seen above, the text of the directive attempts to widen the scope of its provisions to include activities perpetrated in the territory of another member state or a third country.[172] This, along with the extension of the scope to include branches of institutions having their head office outside the Community,[173] reflect the acknowledgement of the transnational character of the money laundering process and the need to adopt to the greatest extent possible, uniform counter-measures, as loopholes have the potential to render the provisions meaningless in view of market globalisation. These attempts to broaden the extraterritorial scope of the directive are coupled by parallel efforts to impose its standards on a series of non-EU countries. The character of this effort, as will be seen below, is greatly influenced by the relationship of these countries with the European Union.

A. Extension to the countries of the European Free Trade Association/European Economic Area

The signature in 1992 of the European Economic Area Agreement (EEA) by the EFTA countries, extended *inter alia* the applicability of the money laundering

[170] For a discussion see chapter 5.
[171] Commission, 1995, p.16.
[172] Article 1, indent 3 *in fine*.
[173] Article 1, indents 1 and 2.

directive to the ratifying countries. After the accession of Austria, Finland and Sweden to the European Union and the non-ratification of the EEA Agreement by Switzerland, the extension of the directive's applicability on the basis of the Agreement covers Iceland, Liechtenstein and Norway. The three new EU members have had to transpose the directive as part of their membership obligations, while Switzerland continued with the implementation of the provisions of the directive, which started prior to the referendum on the ratification of the Agreement, notwithstanding its negative outcome.[174]

The application of the provisions of the directive in Iceland, Norway and Liechtenstein has been assessed by the EFTA Surveillance Authority, which issued, in 1995 and 1998, implementation reports in line with the relevant reports by the Commission of the European Communities.[175] According to the 1994 report, all EFTA/EEA states had implemented its provisions, with no major legal or practical difficulties having being identified.[176] This positive assessment was reiterated in the 1998 report, where the Authority considered the implementation of the directive to be 'very satisfactory' in all three states, which, in some instances, were deemed to have adopted more comprehensive anti-money measures than the directive.[177]

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[174] See E.U. Savona (in co-operation with F. Manzoni) (1999), *European Money Trails*, Harwood Academic Publishers: Australia, Canada, China, France, Germany, India, Japan, Luxembourg, Malaysia, the Netherlands, Russia, Singapore, Switzerland, pp.137-138.

[175] The Commission reports were prepared on the basis of article 17 of the directive, stating that 'one year after 1 January 1993, whenever necessary and at least at three yearly intervals thereafter the Commission shall draw up a report on the implementation of this Directive and submit it to the European Parliament and the Council'. According to Protocol 1 on Horizontal Adaptation of the EEA Agreement, the EFTA Supervisory Authority is called in such cases to prepare concurrently a 'corresponding report or assesment or the like' regarding the EFTA states.

[176] European Economic Area, Standing Committee of the EFTA States, *Report under article 17 of the money laundering directive 91/308/EEC*, Doc. S/00/R/005, restricted, Brussels, 13.12.1994, paragraphs 22 and 23.

[177] Report of the EFTA Surveillance Authority on the implementation of the Money Laundering Directive by Iceland, Liechtenstein and Norway, summary and conclusions. All three states for instance went beyond the directive minimum in covering money laundering from all criminal activities (see paragraph 2.2.4).

B. Extension to the countries of Central and Eastern Europe

The need to extend the provisions of the directive to the countries of Central and Eastern Europe in the context of enlargement could already be discerned in the 1995 Commission White Paper on Preparation of the Associated Countries of Central and Eastern Europe for integration into the internal market of the Union.[178] The document contains a recommendation to these states to establish suitable standards against money laundering as soon as possible, 'in order to avoid their financial sectors being used for laundering of proceeds from criminal activities in general and drug offences in particular'.[179] Money laundering counter-measures are placed here primarily within a market logic, as the overall purpose of the White Paper was to provide a guide to the countries concerned regarding their alignment with the internal market, rather than constituting a complete accession framework involving the acceptance of the *acquis communautaire* as a whole.[180]

This approach has been reflected in the 'Europe Agreements', which aimed at achieving advanced association between the Central and Eastern European countries and the European Union and have been characterised as 'the main vehicle to prepare for accession'.[181] All these agreements, which aim to provide a framework for the candidate countries' gradual integration in the Community through the fulfillment of a series of necessary conditions, contain a specific and similarly drafted 'money laundering' clause. For instance, article 86 of the agreement with the Czech Republic[182] reads as follows:

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[178] Commission of the European Communities (1995), *White Paper- Preparation of the Associated Countries of Central and Eastern Europe for integration into the Internal market of the Union*, COM(95)163 final.
[179] Commission, 1995, p.287.
[180] Commission, 1995, p.2.
[181] M. Maresceau and E. Montaguti (1995), 'The Relations between the European Union and Central and Eastern Europe: A Legal Appraisal' in *Common Market Law Review*, vol.32, p.1328.
[182] OJ L360, 31.12.1994, p.2

1. The parties agree on the necessity of making every effort and co-operation in order to prevent the use of their financial systems for laundering of proceeds from criminal activities in general and drug offences in particular.

2. Co-operation in this area shall include administrative and technical assistance with the purpose of establishing suitable standards against money laundering *equivalent to those adopted by the Community* and international fora in this field including the Financial Action Task Force (FATF).'[183]

The pressure for the adoption of the directive standards has been intensified by the conclusion in 1998, in line with the provisions of the EU Action Plan to Combat Organised Crime,[184] of the 'Pre-Accession Pact on Organised Crime between the member states of the European Union and the applicant countries of Central and Eastern Europe and Cyprus'. [185] The scope of the Pact extends beyond the framework of the internal market and covers a wide range of measures to combat organised crime, which, due to the rapid developments in the field of Justice and Home Affairs, are viewed now as part of the *acquis communautaire* that the candidate countries must implement in order to accede to the EU. In this context, principle 13 of the Pact contains a two-fold 'money laundering' clause: in the policing field, candidate countries undertake to set up financial intelligence units as defined by the Egmont Group;[186] and at the legal regulation level, it is

[183] Emphasis added.
[184] OJ C251, 15.8.1997, p.1. Recommendation 3 of the Action Plan provides *inter alia* that: 'The European Council encourages the Council and the Commission to define in common with the candidate countries of Central and Eastern Europe, including the Baltic States, a Pre-accession Pact on cooperation against crime, which may include provisions for close cooperation between these countries and Europol and undertakings for the rapid ratification and full implementation of the Council of Europe instruments which are essential to the fight against organized crime...The Pact should be based on the *acquis* of the Union in the field of organized crime and form part of the pre-accession strategy in which the potential of the existing instruments such as the Phare programme should be fully explored. In the discussions with the candidate countries, the need should be underlined for them to reach a standard which is comparable to that of the Member States of the Union...'.
[185] OJ C220, 15.7.1998, p.1.
[186] Defined as: 'A central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime; (ii) required by national legislation or regulation, in order to combat money laundering'. Principle 13(2). For an extensive analysis of the establishment and functions of financial intelligence units, see chapter 7.

agreed that there should be full implementation of the FATF Recommendations, the Council of Europe Convention and the EC Directive.[187]

The wording of the Pre-Accession Pact leaves very little margin of discretion to the candidate countries regarding the implementation of EC anti-money laundering standards. The recourse to 'equivalent' standards in the Europe Agreements has been replaced by the call for 'full implementation' of the directive. This choice clearly reflects the recent Commission assertion that the directive 'is an integral part of the *acquis communautaire* and all candidate countries will be required to implement it', adding that 'efforts to assist in this process form part of the pre-accession strategy'.[188] In this manner, the directive constitutes an eloquent example of what has been deemed to be a process of 'voluntary harmonisation', where candidate countries have to adapt their legislation to Community laws which have no binding force in relation to them and in whose framing they may have had no real participation.[189] This process constitutes undoubtedly a demanding challenge for the candidate countries and raises a series of interrelated issues in the legal, economic, social and human rights spheres.[190]

C. Extension to offshore jurisdictions

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[187] Principle 13(1).

[188] Commission, 1998, p.6. According to the Commission, technical assistance in this respect is provided within the framework of its PHARE multi-country progamme to combat drugs, covering 13 central and eastern European countries. A further initiative in that respect is the establishment of the 'Octopus' project, under the auspices of which the Commission co-operates with the Council of Europe in evaluating *inter alia* money laundering counter-measures: see V. Mitsilegas (1999) 'International and Regional Initiatives' in B. Rider and Ch. Nakajima (eds.), *Anti-Money Laundering Guide*, CCH Editions, paragraph 82-175. For a detailed analysis of the implementation of the directive provisions, along with the provisions of the United Nations and Council of Europe Conventions and the FATF Recommendations, see Council of Europe/PHARE, European Committee on Crime Problems, Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (PC-R-EV), *Annual Report 1997-1998*.

[189] A. Evans (1997), 'Voluntary Harmonisation in Integration between the European Community and Eastern Europe' in *European Law Review*, vol.22, p.202.

[190] See also V. Mitsilegas (1998) 'Legal Transplants in the Construction of a "European Security Space"-The Evolution of Money Laundering Countermeasures in Eastern Europe as a Challenge for EU Enlargement' in L. Costa and S. Fromhart (eds.), *East Meets West: The Challenge of Enlarging*

One of the most prominent trends in money laundering techniques has been the use by launderers of offshore jurisdictions. A recent definitional attempt perceives the latter as jurisdictions 'elements of the legal system of which [are intended to] encourage the introduction into and retention under that system of assets or business activities which would, but for those elements (or some of them), have fewer or no connections with the jurisdiction'.[191] In this manner, these jurisdictions attract a large number of financial institutions and transactions, by offering a series of incentives. According to a detailed study conducted by the United Nations:

> ' Offshore financial transactions have a precise meaning. Banks or other financial institutions operating 'off-shore' are exempt from a wide range of regulations normally imposed on 'onshore' institutions. Their transactions are tax-exempt, not encumbered by reserve requirements, free of interest-rate restrictions and often, though not always, exempt from regulatory scrutiny with respect to liquidity or capital adequacy. Dealing with non-resident clients, almost always other financial institutions, they usually transact a wholesale banking business denominated in a foreign currency or currencies'.[192]

In the words of the Financial Action Task Force, offshore centres have the following common characteristics facilitating money laundering: a series of multiple financial transactions through the centre; use of nominees or other middle men to manage these transactions; and an international network of shell companies.[193] These features help to move criminally generated funds rapidly through several offshore locations, which then can be invested in an 'on-shore'

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the European Union, Institute on Western Europe, Columbia University, New York, New York, pp.31-46.

[191] W. Hughes (1999)'Characteristics of Offshore Jurisdictions' in B.A.K. Rider and Ch. Nakajima (eds.), *op. cit.*, paragraph 84-000.

[192] United Nations, Office for Drug Control and Crime Prevention (1998), *Financial Havens, Banking Secrecy and Money-Laundering*, New York, p.21.

[193] Financial Action Task Force on Money Laundering, *Annual Report 1998-1999*, Annex C, 1998-1999 Report on Money Laundering Typologies, paragraph 20. The UN Report adds to this list factors such as the prevalence of unregulated bank-like institutions such as trust companies, strong bank secrecy laws, the availability of mobile accounts and casinos, the availability of free trade zones, the dissemination of information about available services, the willingness to provide false documentation and the existence of a wide range of financial institutions, such as branches of 'on-shore' banks, indigenous banks or international business corporations. United Nations, *op. cit.*, pp.24-26.

financial market.[194] Acknowledging those trends, the FATF revised Recommendations of 1996 include new Recommendation 25, which provides that 'countries should take notice of the potential for abuse of shell corporations by money launderers and should consider whether additional measures are required to prevent unlawful use of such entities'.

Many off-shore jurisdictions are closely associated, in one way or another, with the European Union. Some of them are linked with EU countries by specific historical, political or economic ties and enjoy special economic and financial relations with them facilitating capital mobility, especially towards the European Union.[195] Examples of these are the Channel Islands and the Isle of Man in the case of the United Kingdom, and a number of the overseas territories associated with European Union countries.[196] Other jurisdictions, such as Andorra, Liechtenstein or Cyprus are preferred for money laundering purposes due to their geographical proximity to the European Union.[197]

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[194] FATF, *op. cit.*, paragraph 21. The Report notes the difference in techniques when the offshore jurisdiction is used for tax evasion. In that case, rather than having the funds moving between jurisdictions, they usually move to a single offshore location where they are sheltered from the home country's fiscal overview. On the process of currency smuggling and the use of shell corporations for that purpose in a European context see Savona, *op. cit.*, p.155.

[195] Savona, *op. cit.*, p.14.

[196] *Ibid.* According to part four of the Amsterdam EC Treaty on 'association of the overseas countries and territories' (articles 182-188- ex 131-136a), and annex II, Community law applies in a very limited manner in the following countries and territories: Greenland; New Caledonia and Dependencies; French Polynesia; French Southrn and Antarctic Territories; Wallis and Furtuna Islands; Mayotte; Saint Pierre and Miquelon; Aruba; Netherlands Antilles; Anguilla; Cayman Islands; Falkland Islands; South Georgia and the South Sandwich islands; Montserrat; Pitcairn; Saint Helena and Dependencies; British Antarctic Territory; British Indian Ocean Territory; Turks and Caicos Islands; British Virgin Islands; and Bermuda. Similar is the case regarding the Channel Islands and the Isle of Man, according to article 299 (ex 227) and Protocol no 3 annexed to the UK/Denmark/Ireland accession act. For an analysis of money laundering counter-measures in the case of the former Dutch colonies, see C.D. Schaap (1998), *Fighting Money Laundering with Comments on the Legislation of the Netherlands Antilles and Aruba*, Kluwer Law International, London, The Hague, Boston.

[197] Savona, *op. cit.* On a detailed list of off-shore jurisdictions world-wide, see United Nations, *op. cit.*, p.29. The special position of Liechtenstein, being an EEA member, and Cyprus, being a candidate country, must be noted in this respect. Due to its candidate country status, Cyprus has, at the legal level, extensively implemented EC and international anti-money laundering standards. See Council of Europe/PHARE Report, *op. cit.* See also Ministry of Foreign Affairs of the Republic of

The need to apply equivalent anti-money laundering standards to these countries and territories is reflected in the Action Plan to Combat Organised Crime,[198] whose Recommendation no 30 reads as follows:

> 'Member States should examine how to take action and provide adequate defenses against the use by organized crime of financial centres and off-shore facilities, in particular where these are located in places subject to their jurisdiction. With respect to those located elsewhere, the Council should develop a common policy, consistent with the policy conducted by Member States internally, with a view to prevent the use thereof by criminal organizations operating within the Union...'.

In the specific money laundering context, similar arguments had been made by the European Parliament as early as 1990, during its reading of the draft directive, when an addition to the draft provided that the directive 'shall cover the entire Community, including territories with no special control regulations governing financial transactions, such as, for example, the Channel Islands, Monaco and Campione d'Italia'. [199] As these proposals were not included in the 1991 directive, the Parliament expressed similar concerns in its report on the Second Commission Report on the implementation of the directive.[200] The Parliament put forward the view that the application of anti-money laundering legislation to these countries can be assured through a recourse to article 10 of the EC Treaty (ex article 5) which places member states under a duty of 'genuine co-operation and assistance' owed by them to the Community.[201] Following this broad reasoning, the Parliament

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Cyprus (1998), *Measures taken by the Republic of Cyprus on Preventing and Combating Money Laundering*, Nicosia.

[198] See note 184.

[199] New article 8c. See note 29. A further addition regarding certain independent off-shore jurisdictions was made by the insertion of article 8d, calling at member states to ensure that 'the conveyance of cash across their frontiers toward Liechtenstein, Monaco or the Vatican State is controlled'.

[200] European Parliament, Committee on Legal Affairs and Citizens' Rights (1999i), *Report on the Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive (COM(98)0401-C4-0396/98),* Rapporteur: E. Newman, Draftsman: I. Lambraki, DOC. A4-0093/99, 26.2.1999, p.14.

[201] European Parliament, 1999i, *op. cit.* Article 10 TEC reads as follows: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They

called, in its motion for a Resolution on the Commission Report, for an extension of the scope of the directive. According to paragraphs 6, 7 and 18, the Parliament:

> '6. Calls upon the Member States, the Council and the Commission to take the necessary measures in order to prevent the use of shell companies established in accordance with the law of a Member State or of a third country for the purpose of money laundering wherever such activity has a sufficiently close relationship to the European Union;
> 7. calls upon the Member States, the Council and the Commission to ensure the application of anti-money laundering legislation to those territories of the Member States to which Community law does not apply or does apply only in a restricted manner by means of substantiation of the duty of genuine cooperation and assistance which Member States owe the Community and which finds expression in the obligation laid down in Article 5 of the EC-Treaty;
> 18. strongly recommends that, as part of the fight against money laundering in Europe, Member States continue their efforts to bring "tax haven countries" into the regime foreseen by the *acquis communautaire'*.

The concerns of the European Parliament obtained an increased political significance at the recent summit of the European Council in Tampere. The summit, which debated to a great extent issues related to the Amsterdam objective of the establishment of the European Union as an 'area of freedom, security and justice', emphasised the need to further anti-money laundering standards, in particular regarding off-shore jurisdictions. Paragraph 57 of the Presidency Conclusions reads as follows:

> 'Common standards should be developed in order to prevent the use of corporations and entities registered outside the jurisdiction of the Union in the hiding of criminal proceeds and in money laundering. The Union and Member States should make arrangements with third country offshore-centres to ensure efficient and transparent cooperation in mutual legal assistance following the recommendations made up in this area by the Financial Action Task Force'.[202]

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shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'.

In this statement, that to some extent reflects the Parliament's points 6 and 7, the European Council prioritises the adoption of measures related to off-shore companies. The wording of the Council is careful to avoid references to other jurisdictions, by focusing rather on corporations and entities outside the Community. In this manner, the ambiguity of the Parliament's reference to a 'sufficiently close relationship with the EU' is avoided, while at the same time the potential of the provision is open-ended. Regarding the off-shore centres, the Parliament's demand for the application of anti-money laundering standards is watered down by the limitation of paragraph 57 to the field of mutual legal assistance with third countries. No express reference is made either to territories or countries enjoying special relations with EU member states, or to the issue of tax havens. The Tampere initiative retains however its importance, as it constitutes the first major political acknowledgment at EU level of the problems created by offshore jurisdictions for the proper functioning of money laundering counter-measures.[203]

This acknowledgement is clearly reflected in the recent call by the Economic and Social Committee for the drawing up of a charter or a code of good conduct in money laundering matters. The code, which will be drawn up by the Commission and institutions such as the United Nations, the IMF, the World Bank, the European Investment Bank and the European Bank for Reconstruction and Development will include the basic FATF Recommendations, whose application would be a condition for the granting of financial aid. In addition to that, offshore centres that do not abide by the code or opposed to the openness of transactions

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[202] Text downloaded from http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm

[203] The issue of the applicability of EU standards to offshore jurisdictions has also been addressed in the more general field of taxation by the draft directive 'to ensure a minimum of effective taxation of savings income in the form of interest payments within the Community' (DOC. 598PC0295, downloaded from http://europa.eu.int), which is accompanied by a Decision to extend the applicability of some provisions to dependent or associated territories of member states or territories which have special responsibilities or taxation prerogatives in respect of other territories (article 2). A similar extension is included in the Code of Conduct for Business taxation, which was adopted during the ECOFIN Council Meeting on 1.12.1997 (OJ C002, 6.1.1998, p.1) (point M).

should be cut off fro international funds transfer systems.[204] The Committee's proposals reflect the attempts of the Community to emerge as an international actor in the field of money laundering and organised crime and is aligned with the intensified pressure exercised by FATF to offshore centres to fight money laundering in an effective manner.[205]

D. Other third countries

The attempts to broaden the extraterritorial effect of the EC money laundering legislation are not only confined to candidate countries or offshore jurisdictions. In a similar vein with the Europe Agreements, the Commission continuously seeks to incorporate an anti-money laundering clause in all the agreements, 'of whatever type', it concludes with non-member states.[206] According to the Commission, 'the standard clause refers to efforts and cooperation to avoid money laundering and to the establishment of suitable standards against money laundering equivalent to those adopted in the EU and in other international for a such as the FATF'.[207] In this manner, the adoption of equivalent anti-money laundering standards is elevated to an external policy issue, with the European Union emerging as an international actor in the field.

II. THE NEW DRAFT MONEY LAUNDERING DIRECTIVE

A. Introduction

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[204] Economic and Social Committee (2000), *Opinion on the Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering*, DOC. ECO/028, Brussels, 26.1.2000, paragraphs 12.10 and 12.11.

[205] In this context see Financial Action Task Force (2000), *Report on Non-Cooperative Countries and Territories*, 14.2.2000.

[206] Commission, 1998, p.7.

[207] *Ibid.*

A great challenge to the effective operation of the anti-money laundering framework set out by the 1991 directive has been posed by the speed with which the money laundering process has evolved during the ensuing decade. Both the unprecedented legal regulation in the field, urging launderers to find alternative means of money laundering, and parallel developments in technology, drastically changing the mode in which financial transactions are conducted, have the potential to render a number of the directive provisions ineffective, if not outdated. This fact has been acknowledged by the Contact Committee set up by the directive to monitor its effectiveness and implementation,[208] and also by the Commission and the Parliament.[209] Their discussions on the directive, following also parallel developments in *fora* such as the FATF, led to an acknowledgement of the need to revise the 1991 directive in order to take into account such developments. This need, which was also reflected in the recent Commission Action Plan on Financial Services,[210] was addressed by the recent Commision's directive proposal,[211] whose article 1 seeks to amend directive 91/308 in two main respects: in extending the scope of the money laundering offence; and in extending the *ratione personae* scope of the duties imposed by it. Further amendments were proposed with regard

[208] The Committee is established by article 13 of the directive, whose first paragraph entrusts it with the following tasks: to facilitate harmonised implementation of the directive through regular consultation on any practical problems arising from its application and on which exchanges of view are deemed useful; to facilitate consultation between the member states on the more stringent or additional conditions and obligations which they may lay down at national level; to advise the Commission, if necessary, on any supplements or amendments to be made to the directive or on any adjustments deemed necessary, in particular to harmonise the effects of article 12 (stating that member states shall ensure that the directive provisions are extended in whole or in part to professions and to categories of undertakings other than those covered by its scope, which engage in activities which are particularly likely to be used for money laundering purposes); to examine whether a profession or a category of undertaking should be included in the scope of article 12 where it has been established that such profession or category of undertaking has been used in a member state for money laundering.

[209] Commission, 1998; European Parliament, 1999i.

[210] Commission of the European Communities (1999i), *Financial Services: Implementing the Framework for Financial markets: Action Plan*, COM(1999)232, 11.5.1999.

[211] Commission of the European Communities (1999ii), *Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering*, COM(1999)352 final, 99/0152(COD), Brussels, 14.7.1999.

the identification requirements, while a new provision has been inserted to regulate aspects of information exchange on suspicious transactions.[212]

B. The extension of the list of predicate offences

As mentioned above, the major international initiatives to counter money laundering –the United Nations Convention, the Council of Europe Convention, the FATF Recommendations- initially criminalised only the laundering of proceeds from drug offences. The Strasbourg Convention and the FATF however provide for the optional extension of criminalisation to further categories of predicates. This approach has been followed by the money laundering directive, which is largely based on the wording of the Vienna Convention, but leaves to the member states the possibility to extend the scope of prohibited money laundering.[213]

The years following the adoption of these measures were marked by a series of reactions against the limitation of the money laundering offence to drug crimes and calls in favour of its extension to cover a wide range of offences, including organised crime. This is a reflection of a shift in the policy agenda from the 'war on drugs', which had largely served as a justification for the early money laundeirng counter-measures to the fight against the multi-faceted threat of organised crime. It also mirrors law enforcement and expert views asserting that the limitation of money laundering to drug offences renders the legislation ineffective. As is argued by the drafters of a recent United Nations Report:

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[212] The two other articles of the new draft deal largely with implementation issues. Article 2 assigns to the Commission the task to carry out, three years after the adoption of the directive, and in the context of the report provided for in article 17 of the 1991 directive, a particular examination of aspects relating to the specific treatment of independent legal professionals, the identification of clients in non-face to face transactions and possible implications for electronic commerce. Article 3 on the other hand imposes a series of technical obligations to the member states regarding the implementation of the directive, with the most crucial one being the time-frame set out by paragraph 1, which demands national implementing legislation to be adopted by 31.12.2001 the latest.

[213] See part 2 above.

> 'The time may have come to end the artificial division of criminal money into categories depending on the nature of the crime. As long as some criminal money can be laundered legally, the financial system will argue that its financial centre arrangements to hide funds have a legitimate purpose. Banks and brokers who are asked to launder money will argue that they thought the money was legitimate because, although criminal in nature, it came from a non-predicate crime'.[214]

This policy shift is clearly reflected in the revision of the FATF Recommendations. The earlier combination of Recommendations 4 and 5 called for the criminalisation of drug money laundering as set forth in the Vienna Convention, *while leaving in the consideration of countries* the extension of the offence to any other crimes for which there is a link to narcotics or to all or a number of serious offences. This framework has been replaced by revamped Recommendation 4, whose first part is identical in calling for drug money laundering criminalisation, while the new second part reads as follows: '*Each country should extend the offence of drug money laundering to one based on serious offences*. Each country would determine which serious crimes would be designated as money laundering predicate offences'.[215]

At the European Union level, the issue of the extension of the money laundering predicates has partly been addressed in the specific context of third pillar measures on fraud[216] and confiscation.[217] Recommendation 26(b) of the Action Plan on Organised Crime, on the other hand, states *inter alia* that 'criminalization of laundering of the proceeds of crime should be made as general as possible, and a

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[214] United Nations, *op. cit.*, p.66.
[215] Emphasis added.
[216] The Second Protocol of the Convention on the Protection of the European Communities' Financial Interests (OJ C221, 19.7.1997, p.11), criminalises the laundering of proceeds of fraud, at least in serious cases, and of active and passive corruption (articles 1(e) and 2).
[217] The Joint Action on money laundering, the identification, tracing, freezing and confiscation of the instrumentalities and the proceeds from crime (OJ L333, 9.12.1998, p.1) calls at member states to ensure that no reservations are made to article 6 of the Council of Europe money laundering Convention which *inter alia* establishes the offence of money laundering in so far as serious offences are concerned (article 1(b)). On a more detailed analysis see chapter 4.

legal basis should be created for as broad as possible a range of powers of investigation into it'.[218]

Similar calls were made in the evaluation of the money laundering directive by the EC institutions. In its report on the first Commission implementation report, the European Parliament adopted a motion for a Resolution whose point 5 calls on the member states, 'insofar as they have not already done so, to extend their legislation on combating money laundering not only to money derived from drugs trafficking but to all money required from professional and organized crime'.[219] Although this call has been followed by the majority of the member states in their implementation of the directive, the latter's minimalist approach has been criticised also by the Commission, whose Second implementation report stated on the matter that:

> 'Despite the progress made by the Member States in the coverage of their anti-money laundering legislation the question nevertheless arises as to whether it is acceptable that the Directive, which remains one of the basic international texts in this area, should fail so clearly now to reflect the current reality'.[220]

The Commission draft amending the 1991 directive reflects these developments in amending the definition of money laundering to include new predicate offences. According to its Preamble, this change is an acknowledgment of international trends, such as the revision of the FATF Recommendations, and is justified by the need to facilitate suspicious transaction reporting and international co-operation in this area.[221] Rather than following an 'all-crime' prohibition of money laundering, the directive, in amended article 1(E), opts for an extension to cover, along with the

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[218] On progress regarding the investigation aspect, see chapter 6.
[219] European Parliament, Committee on Legal Affairs and Citizens' Rights, *Report on the first Commission's report to be submitted to the European Parliament and to the Council on the implementation of the Directive on the prevention of the use of the financial system for the purpose of money laundering (91/308/EEC)(COM(95)0054-C4-0137/95),* Rapporteur: K.-H. Lehne, DOC. A4-0187/96, 6.6.1`996.
[220] Commission, 1998, p.8.
[221] Recitals 12 and 13.

drug offences of the 1991 text, the following conduct: participation in activities linked to organised crime; and fraud, corruption or any other illegal activity damaging or likely to damage the European Communities' financial interests. The 'minimum standard' approach is retained, as member states are provided with the discretion to designate as a predicate any other criminal activity.

A detailed discussion of the justification and the issues surrounding this amendment will take place in a following chapter.[222] Here it suffices to say that the specific, but at the same time vague types of conduct listed as predicates are another clear demonstration of political compromise in the drafting process. As the pressure for an 'all-crime' prohibition meets concerns over the extent of EC competence in the field of criminal law, the outcome has been to include predicates legitimated by prior EC or EU action in the field, a choice that was greatly criticised in subsequent readings of the draft.[223] The problems are particularly evident in view of the, almost simultaneous, adoption by the Council of a Joint Position reflecting the EU views on the proposed United Nations Convention against organised crime.[224] Article 1(5) reflects the Council's stance that, in the money laundering field, the convention 'should extend to a broad range of offences

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[222] See chapter 4.

[223] In its first draft legislative proposal amending the Commission's draft, the European Parliament deleted the reference to the predicates of fraud, corruption and any other illegal activities affecting the financial interests of the Communities. According to the Parliament, these predicates, 'despite all laudable intentions, do not logically belong in this directive'. European Parliament, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (1999ii), *Draft Report on the proposal for a European Parliament and Council directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering*, Rapporteur: K.-H. Lehne, DOC. PRELIMINARY 1999/0152(COD)-F1, 3.11.1999, p.24. Quite surprisingly, in a subsequent reading by the Parliament, the reference to the predicates was reinstated, now covering 'fraud, corruption and any other illegal activities *to the detriment of the public authorities* and especially the financial interests of the European Communities', thus broadening the offence further than the Commission's draft! See European Parliament, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (1999iii), *Draft Report on the proposal for a European Parliament and Council directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering*, Rapporteur: K.-H. Lehne, Draftsman: D.R. Theato, DOC. PRELIMINARY 1999/0152(COD)-F1 REV.1, 16.12.1999. Emphasis added.

[224] Joint Position of 29.3.1999 defined by the Council on the basis of Article K.3 of the Treaty on European Union, on the proposed United Nations convention against organised crime, OJ L87, 31.3.1999, p.1.

and, in particular, should be consistent with the 40 Recommendations of the Financial Action Task Force'. What cannot be achieved at the Community level, the Council thus attempts to do through the 'back-door': that is, by way of the ratification by member states of a UN Convention containing a broad criminalisation of money laundering.[225]

C. The extension of the *ratione personae* scope

Another prevalent tendency in the years following the adoption of the directive has been the increasing use of wider categories of financial and non-financial institutions for money laundering purposes. This tendency reflects, according to policy makers, the adoption of money laundering counter-measures and the increased level of compliance by credit and financial institutions, leading launderers to shift to non-regulated professions for their activities.[226] On the other hand, this tendency can also be associated with the increasing sophistication in money laundering activities, which involve a wide range of intermediary professions of a varied expertise. The growing role of professional services providers in money laundering facilitation has been emphasised in a recent FATF report on money laundering typologies, which is worth quoting at length:

> 'Accountants, solicitors, and company formation agents turn up even more frequently in anti-money laundering investigations. In establishing and administering the foreign legal entities which conceal money laundering schemes, it is these professionals that increasingly provide the apparent sophistication and extra layer of respectability to some laundering operations'.[227]

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[225] It is interesting to note here that the European Parliament put forward in the directive amendment a definition of organised crime meaning 'the activities of persons, acting in concert with a view to committing serious crime, involved in any criminal organisation which has a structure and is, or has been, established for a certain period of time'. European Parliament, 1999iii. According to the Parliament, the definition chosen conforms to the Council's Joint Position, on the basis of which it can be assumed that there is currently agreement among the Member States in this respect.
[226] See for instance Financial Action Task Force, *Annual Report 1996-1997*, paragraph 16.
[227] FATF 1998/1999, paragraph 47.

The FATF addressed these developments in the revision of the 40 Recommendations in 1996. Recommendation 8 (ex 9) was revised to include a further indent calling on member states to ensure the application and effective application of anti-money laundering standards equally also to non-bank financial institutions which are not subject to a formal prudential supervisory regime in all counties, such as *bureaux de change*. Recommendation 9 (ex 10) on the other hand calls on national authorities to consider the extension of the applicability of the Recommendations' duties to 'the conduct of financial activities as a commercial undertaking by businesses or professions which are not financial institutions, where such conduct is not allowed or not prohibited'.

The need to address this tendency has been highlighted by a number of EC institutions. Notwithstanding the directive's extensive coverage of financial institutions, considerable pressure has been exercised by the European Parliament towards the amendment of the relevant provisions. The Parliament criticised the Second Commission implementation report on the grounds that it neglected competition-related aspects in the financial sector, in not demonstrating: whether all activities in the financial sector are covered in practice; whether all relevant actors have to face the same or at least comparable obligations; and whether, from an economic point of view, these obligations affect their competitive position in an equal way.[228] The Parliament therefore called for an amendment containing 'measures aimed to ensure that legal requirements imposed on the financial sector in the wide sense of the term are equal for all branches of that sector and that the competitive position of economic actors in the financial sector is affected in an equal way in practice'.[229]

In the same context, the Parliament proposed the extension of the *ratione personae* scope of the directive to cover a wide range of professions at risk of being involved in money laundering or abused by money launderers. The indicative

[228] European Parliament, 1999i, p.12.
[229] Motion for a resolution, point 1(b).

list includes both financial and non-financial professions such as estate agents, art dealers, auctioneers, casinos, *bureaux de change*, transporters of funds, notaries, accountants, advocates, tax advisors and auditors. The Parliament called for either the full or partial application to them of the directive provisions, or the application of new rules taking into account specific characteristics of the professions such as the duty of discretion.[230]

The Parliament's proposal gives a concrete legislative form to the discussions under the auspices of the Contact Committee with a view of extending the scope of the directive.[231] It also reflects the political *impetus* in the European Union for the need to extend the directive's scope. The conclusions of the 1996 Dublin European Council contain a commitment to its full application and 'possible extension to those relevant professions and bodies outside the classical financial sector'.[232] The Action Plan to Combat Organised Crime one year later called for the extension of the directive's reporting obligation to 'persons and professions other than the financial institutions mentioned in this Directive'.[233]

The new Commission's draft reflects these concerns in two respects: in amending the list of financial institutions covered by the directive; and in adding to its scope an extensive list of non-financial professions. With regard to financial institutions, new articles 1(b) and 2a specifically include within the scope of the directive the activities of currency exchange offices (*'bureaux de change'*) and of money transmission/remittance offices. It also adds to the list investment firms as defined in article 1 of directive 93/22/EEC.[234] In this manner, the Commission took

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[230] Point 1(a).

[231] The Committee noted *inter alia* that member states should consider whether a series of professions involved a demonstrable risk of money laundering. The list covered professions the gambling industry and dealers in high-value items, as well as, under certain circumstances, the legal profession. See Commission 1998, pp.10-11.

[232] Commission 1998, p.11. The Council conclusions can be found as annex 1 therein.

[233] Recommendation 26(e).

[234] It is interesting to note here that, while the new draft includes, as the 1991 directive, insurance companies duly authorised in accordance with Directive 79/267/EEC, the text, unlike the 1991 directive, does not take into account subsequent amendments of this directive, in particular by directive 92/96/EEC, which was adopted after the money laundering directive. The recent call of the

into consideration the arguments of the Parliament casting doubts on whether these activities were really covered by the 1991 directive.[235][236]

However, perhaps the most extensive amendment to the directive is made by the insertion by new article 2a of an exhaustive list of the following legal and natural persons, to whom the directive applies:

-. External accountants and auditors;

-. Real estate agents;

-. Notaries and other independent legal professionals when assisting or representing clients in respect of the:

a. buying and selling of real property or business entities

b. handling of client money, securities or other assets

c. opening or managing bank, savings or securities accounts

d. creation, operation or management of companies, trusts or similar structures

e. execution of any other financial transactions

-. Dealers in high-value goods, such as precious stones or metals

-. Transporters of funds

-. The operators, owners and managers of casinos.

The Commission's list is an ambitious addition to the 1991 directive, which largely follows the proposals of the European Parliament. The list is more restricted than the latter to the extent that it does not include art dealers and auctioneers, since the Commission believes that it is difficult both to define these

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European Parliament to take these developments into consideration was not heard in this respect. See European Parliament, 1999, p.12.

[235] Commission, 1999ii, p.7. Regarding *bureaux de change* and money remittance offices, potential problems were generated by differences in the language versions of the annex to the Second Banking Directive, which provided the basis for the definition of financial institutions for the purposes of the money laundering directive. Investment firms on the other hand were expressly included since the Investment Services Directive (IDS) was adopted in 1993 (OJ L141, 11.6.1993, p.27), after the adoption of the money laundering directive.

[236] The European Parliament amended the provision further to include also in the definition of credit institutions 'an undertaking that issues prepaid cards for payment purposes or creates and manages units of payment in computer networks'. European Parliament, 1999iii, p.8. Concerns to include electronic money undertakings in the scope of the directive are also expressed in specific secondary legislation related to their establishment and supervision: see chapter 5.

activities and to provide an effective monitoring framework. As the Commission notes, the inclusion of art dealers would have the potential of over-extending the scope of the directive, as it 'would also raise the question of applying the same obligations to any dealer in high value items, including for example luxury car dealers, jewellery shops or stamp and coin dealers'.[237]

The main instance however where there is a danger of over-extension of the directive's scope relates to the inclusion of legal professions. The draft attempts to delimit their involvement by providing a list of corporate or financial transactions, where there is the greatest money laundering risk, in the course of which the duties of the directive are imposed.[238] Taking into consideration the special nature of legal professions, article 6 establishes a series of derogations from the obligation to report to the national authorities responsible for combating money laundering. According to paragraph 3, member states may designate as this authority the bar association or appropriate self-regulatory body of the profession concerned.

The same paragraph further states, in an attempt to safeguard the well-established principle of lawyer-client confidentiality, that member states shall not be obliged to apply this duty to legal professionals 'with regard to information they receive from a client in order to be able to represent him in legal proceedings'. However, this derogation shall not cover any case in which there are grounds for suspecting that advice is being sought for the purpose of facilitating money laundering. These derogations, however, with their limited and vague scope, do not suffice to address the important rule of law and human rights problems created by the involvement of the legal professions in the fight against money laundering.[239]

D. Revisions in the field of customer identification

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[237] Commission, 1999ii, p.9. On an analysis of the issues related to the Commission's choice in this respect, see chapter 5.
[238] See Preamble, recital 23.
[239] For an extensive analysis, see chapter 5.

Another significant challenge to the effective implementation of money laundering counter-measures has been posed by technological advances which have the potential to alter significantly the nature of financial transactions. This is particularly the case with the evolution of new payment technology systems, such as smart cards, on-line banking and electronic cash.[240] The spread of these technologies has been asserted by the Financial Action Task Force, whose recent report identifies the following risks posed by these new developments:

-. Inability to identify and authenticate parties that use the new technologies;

-. Level of transparency of the transaction;

-. Lack or inadequacy of audit trails, record keeping, or suspicious transaction reporting by the technology provider;

-. Use of higher levels of encryption (thus blocking out law enforcement agencies); and

-. Transactions that fall outside current legislative or regulatory definition.[241]

The need to address the issues was brought about by the evolution of new technologies has been addressed by the 1996 revision of the FATF Recommendations. New Recommendation 13 provides that 'countries should pay special attention to money laundering threats inherent in new or developing technologies that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes'.

The difficulties caused by new technologies in respect to customer identification had been highlighted by the European Parliament in 1996, in the first report on the Commission's implementation report. In an eloquent passage, which is worth

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[240] On some aspects of these issues see *inter alia*: C.D. Hoffman (1998),'Encrypted Digital Cash Transfers: Why Traditional Money Laundering Controls May Fail without Uniform Cryptography Regulations' in *Fordham International Law Journal*, vol.21, pp.799-860; and T.H. Ehrlich (1998),'To Regulate or Not? Managing the Risks of E-Money and Its Potential Application in Money Laundering Schemes' in *Harvard Journal of Law and Technology*, vol.11,no.3,pp.833-863.

[241] FATF 1998-99, paragraph 27. The Report contains a detailed analysis of the status of new payment technologies in paragraphs 28 to 34.

quoting at length, the Parliament emphasised these issues in the context of direct banking:

> 'An indispensable precondition for the recognition and prevention by credit and financial institutions of transactions which may involve money laundering is the 'know your customer' principle. It must always be possible to identify clients.
>
> In the new forms of direct banking this has already become impossible. The client performs his transactions by telephone or computer, and there is no longer any visual contact with him. Even the identification of the client when entering into business relations is based on the sending of a registered letter with advice of delivery; even a photocopy of a client's passport or identity card is sufficient evidence of identity.
>
> According to the experts, this approach is abused for money laundering purposes on a massive scale, and is no longer acceptable. It is therefore proposed that, when a client enters into business relations with a bank which operates a direct banking service, the client should first be identified by a third bank through submission of identity documents.'[242]

Addressing the issue, the new Commission draft contains an annex on customer identification in non face-to-face financial operations. The annex establishes a series of principles to be followed in identification procedures in these cases. Principle (i) states as a general aim of the procedures 'appropriate customer identification'. This is ensured by taking account of non face-to-face operations in the internal control procedures established by article 11(1) of the directive (principle (iv)); and, according to principle (v), on the basis of the establishment of detailed procedures, requiring:

a. the use of the contracting institution's branch or representative office which is nearest to the customer in order to carry out a face-to-face identification
b. in cases of non face-to-face identification:

[242] European Parliament, 1996, p.11.

-. A copy of the customer's official identification number or the official number of the identification document, with special attention to be paid to the verification of the customer's address.

-. The carrying out of the first payment through an account opened in the customer's name with a credit institution located in the European Union or the European Economic Area. In a reflection of the extraterritoriality logic, however, member states may allow payments carried out through 'reputable credit institutions established in third countries which apply equivalent anti-money laundering standards'.

-. The verification by the contracting institution that the identities of the holder of the account through which the payment is made and of the customer, as indicated through the identification procedure, are identical. In the case of doubt, the contracting institution should contact the institution where the account was opened in order to confirm the customer's identity. Should doubts still remain, a certificate should be required from this institution 'attesting to the identity of the account holder and confirming that the identification was properly carried out and that the particulars have been registered according to the Directive'.

These identification requirements are not applicable:

-. When there are reasonable grounds to believe that face-to-face contact is being avoided in order to conceal the true identity of the customer and there is suspicion of money laundering (principle (ii)).

-. In operations involving the use of cash (principle iii).

-. In accordance with article 3(7) of the directive, when the counterpart of the contracting institution is another institution acting on behalf of a customer, if the counterpart is located in the European Union or in the European Economic Area (principle (vi)(a)).[243]

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[243] According to principle (vi)(b), if the counterpart is located outside the European Union and the European Economic Area, the institution should check the identity of its counterpart (unless it is well known), by consulting a reliable financial directory. In the case of doubt, the institution should seek confirmation of its counterpart's identity from the third country supervisory authorities. It should also take 'reasonable measures to obtain information' on the customer of its counterpart

-. (in the discretion of member states): in the case of certain insurance operations, when the payment is, according to article 3(8), 'to be debited from an account opened in the customer's name with a credit institution subject to this Directive' (principle v(c)).

This list of identification requirements is neither exhaustive, nor exclusive. Principle (vii) provides that they 'do not preclude the use of other ones which, in the opinion of the competent authorities, may provide equivalent safety for the identification in non-face-to-face financial operations'. Major issues thus arise regarding the uniform implementation of the directive in this regard. This is especially the case in view of the Parliament's amendment of the draft to extend the scope of the annex also to the persons covered by the directive.[244]

E. The policing aspect

Article 6 of the directive contains a reference to the competent authorities responsible at the national level for combating money laundering, which receive the reports made by credit and financial institutions. As the Community lacks competence in crime control aspects of this kind, the directive does not contain any further specification on the nature, characteristics and operation of these authorities and the system of information exchange established by it. As will be seen in a following chapter,[245] this has led to a considerable level of diversity regarding the functioning of the co-operation duty at the national level.

In view of the issue of EC competence, new article 12 comes as some surprise in providing, in its paragraph 2, that 'in case of fraud, corruption or any illegal

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(beneficial owner of the operation- article 3(5) of the directive). These 'reasonable measures' could go from simply requesting the name and address of the customer, when the country applies equivalent identification requirements, to requesting a counterpart's certificate stating that the customer's identity has been properly verified and registered, when in the country in question the identification rerquirements are not equivalent'.

[244] European Parliament, 1999iii, p.15.

[245] See chapter 6.

activity damaging or likely to damage the European Communities' financial interests, the anti-money laundering authorities referred to under article 6 and, within its competences, the Commission, shall collaborate with each other for the purpose of preventing and detecting money laundering', exchanging, to this end, information on suspicious transactions. This avenue of information exchange is qualified by the stipulation, in the same paragraph, that such exchange shall be covered by rules of professional secrecy. Paragraph 3 of the same article further provides member states with the discretion to exempt, in the case of legal professions, bar associations and self-regulatory professional bodies from these obligations.

The establishment of an open-textured duty of co-operation between national financial intelligence units and the Commission, and in particular the exchange of information on suspicious transactions, is a bold step which may face strong reactions in the subsequent readings of the draft directive, probably under the same 'lack of competence' argumentation surrounding the criminalisation of money laundering in the 1990 Commission's draft. The Commission acknowledged in its Explanatory Memorandum that the stage of integration is such as to allow co-operation only in cases of illegal activities damaging the Community's financial interests.[246] However, the existence of EC competence at the information exchange level with crime control units is contested and the lack of similar provisions covering the level of co-operation between financial intelligence units themselves and credit and financial institutions creates a fragmented and vague picture in a field with high demands for the safeguard of human rights and civil liberties.[247]

F. Overview

The Commission's draft directive amending the 1991 provisions is a welcome development addressing to a great extent policy issues arising in the 1990's. In line

[246] Commission, 1999ii, p.11.
[247] For an extensive analysis, see chapter 6.

with parallel international initiatives in the field, such as action by the FATF, the new directive extends, rather than contradicts, the provisions of directive 91/308. This extension raises a series of legal issues which will be examined in detail in the following chapters. Here it is important to note that, as in 1990-1991, and notwithstanding the great progress in European integration with two Treaties- in Maastricht and Amsterdam- which put crime control matters in the picture, the drafting of the new directive is still confronted by thorny issues related to EC competence in this field. It is in this light that one must view both the revisions put forward by the Commission, some of them manifestly an outcome of compromise, but also the matters that were finally excluded from the Commission draft such as fiscal fraud or issues related to the introduction of the EURO to name but few.[248] In view of the amendments already made by the European Parliament and the increased powers it has under the co-decision procedure under which the directive is to be adopted,[249] it remains to be seen how these issues will be addressed in the finally adopted version.

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[248] See European Parliament, 1999i, especially on the issues of the EURO, the extraterritorial application of the directive and electronic money. The Action Plan to Combat Organised Crime, on the other hand, contains Recommendation 29 calling for legislation to combat organised crime in connection with fiscal fraud.

[249] According to articles 47(2), first and third sentences (ex 57) and 95 (ex 100a) of the EC Treaty, which constitute the legal basis of the directive, the procedure to be followed for the adoption of the measure is the co-decision procedure of article 251 (ex 189b). This procedure was introduced by the Maastricht Treaty, after the adoption of the 1991 directive. It enhances the role of the European Parliament, in providing the latter with the opportunity, in case of disagreement, to assert its views towards the adoption of a jointly approved text with the Council, and by ultimately giving to the Parliament the power to veto the proposed legislation. A practical outcome of this change has been that the new measure will be a 'European Parliament and Council' directive, rather than a 'Council' directive as the 1991 one. On a detailed analysis of the co-decision procedure, see *inter alia* P. Craig and G. de Burca (1998), *European Union Law. Text, Cases and Materials*, 2nd edition, Oxford University Press, Oxford and New York, pp.135-137 (under the heading 'the Article 251 procedure).

4

Securitisation through criminalisation: the EU money laundering offence

1. INTRODUCTION

A main component of the anti-money laundering policy has been the criminalisation of the laundering process. The need to combat the laundering of capital by penal means, reflected in both the UN and Council of Europe Conventions, has been acknowledged in the Preamble of the EC directive.[1] Following this assertion, article 2 of the latter establishes that member states shall ensure that money laundering is prohibited. According to the third indent of article 1, money laundering is defined, largely on the basis of the aforementioned Conventions,[2] as consisting of the following conduct when committed intentionally:

-. The conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action

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[1] Council Directive of 10.6.1991 on prevention of the use of the financial system for the purpose of money laundering (91/308/EEC), OJ L166, 28.6.1991, p.77. Preamble, recital 4.
[2] For an extensive analysis, see chapters 2 and 3.

-. The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity

-. The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity

-. Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.

The aim of this chapter is to cast light to a series of issues arising from the introduction of this new, and at first sight quite broad and complex offence. The analysis aims at placing the challenges that the money laundering offence poses to fundamental principles of criminal law in the light of the broader impact of a security logic to criminal law policies. This will be done by beginning with an analysis of issues related to the policy context and justification of the offence, prior to examining problems arising in relation to its elements.

2. MONEY LAUNDERING AS AN ANCILLARY OFFENCE

A principal feature of the money laundering offence is its association with a former predicate offence generating the proceeds which are placed in the laundering process. On the basis of this feature, money laundering has been classified within the category of the so-called 'ancillary offences', whose common characteristic is that they bear some kind of auxiliary relationship to primary harm crimes.[3] According to Norman Abrams, who put forward the term, these offences are marked 'by group activity or conduct leading up to, or involved generally in, the

[3] N. Abrams (1989), 'The New Ancillary Offenses', in *Criminal Law Forum*, vol.1, no.1, pp.1-39, at p. 2.

commission of substantive offenses, or they define as criminal, conduct practiced in the aftermath of a primary harm crime'.[4]

Abrams provides a detailed analysis of the emergence and characteristics of ancillary offences and the challenges they pose for U.S. criminal law. Money laundering is categorised as a derivative, 'after-the-fact' offence, as it does not involve the commission of primary criminal harm.[5] This renders liability for money laundering comparable to accomplice liability, with the following important difference: whereas traditional liability of this kind encompasses aid before, or at the time of the predicate offence, money laundering involves conduct taking place after the commission of the crime. As Abrams concludes, money laundering can thus be viewed as 'a special form of accessory-after-the-fact offense, but with heavier penalties than we traditionally assign to that form of complicitous liability'.[6]

The commission of money laundering 'after-the-fact' brings forward the conceptual similarities of the offence with the crime of receiving, or handling stolen goods. Central to both offences is the commission of a predicate offence and the attempt to safeguard its proceeds. The money laundering offence however is broader in two respects. First of all, it extends beyond the narrow scope of stolen goods, covering proceeds from a wide range of crimes, constituting thus a model 'adaptable to any crime committed for gain'.[7] Furthermore, and rather than focusing solely on handling, the money laundering process is centered on the concealment of the true origin of the criminal proceeds and their appearance as licit funds.

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[4] *Ibid.*
[5] For a categorisation and extensive analysis of the ancillary offences, see chapter 1.
[6] Abrams, *op. cit.*, p.7.
[7] Abrams, *op. cit.*, p.10. A similar view has been expressed in the discussion of the money laundering offence in the German Parliament, which highlighted the limitations of the handling offence to cover all kinds of criminal proceeds. Deutsche Bundestag, 'Entwurf eines Gesetzes zur Bekampfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalitat (OrgKG) in *Drucksache* 12/989, p.26.

The 'after-the-fact' character of the money laundering offence raises also important issues associated with the question of whether the offence generates a discrete harm or not.[8] The answer to this question is linked with the necessity of this new offence to protect a specific legal interest, and whether the latter is identical to the one of the primary harm offence. Further issues are raised by the broad delimitation of the scope of money laundering.[9] As the latter is committed through a series of everyday transactions, further challenges are posed to traditional criminal law principles related to the elements of the offence.

3. INTEREST PROTECTED BY LAW

In justifying the necessity for a separate money laundering offence, the directive, in line with prior international instruments, refers to money laundering as a multifaceted threat, closely associated with the threat of transnational organised crime.[10] This process of securitisation can be translated at the legal level as justifying the criminalisation of money laundering on the grounds of protecting interests ranging from individual ones such as property to collective ones such as state security. Such overarching justification raises significant tensions in view of the debate about whether the actual money laundering offence involves a separate harm from its predicate, and whether it is conceptually different from its model offence of receiving.

The controversy surrounding the demarcation of the protected interests by the money laundering offence has been particularly visible in German policy and legal discourse. According to the justification of the legislation in the German Parliament, the introduction of the money laundering offence serves the task of

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[8] See Abrams, *op. cit.*, p.8, who argues that the discrete harm element in the money laundering offence lies in the enormity of the sums laundered and the regularity and professionalisation in the financial transactions involved.

[9] As Abrams notes, the money laundering offences were created 'by breaking into subparts the total transaction involved in the commission of a traditional primary harm offense and creating new, separate crimes out of a part of the transaction that was not heretofore generally punishable as a separate crime'. Abrams, *op. cit.*, p.8.

[10] See chapter 3.

maintaining the rule of law in the state by eliminating the commission of crimes.[11] This view is associated to the rationale of the evolution of money laundering counter-measures as a means of depriving the criminals of their profits and thus providing a major disincentive for the commission of the primary harm offence. In this manner, the money laundering offence serves to protect the interest of society in the maintenance of law and order.

The broad view linking the money laundering offence with the maintenance of the rule of law is inextricably linked with arguments related to the protection of specific further interests. It has thus been argued that, along with the rule of law, what is protected is also all the interests protected by the predicate offences.[12] The criminalisation of money laundering is deemed thus essential in order to protect interests as diverse as human life, property, the social fabric and public order.

In a parallel line of argumentation, it has been put forward that the protection lies not so much in the prosecution of already committed crimes, but in the elimination of future crimes.[13] While the temporal orientation of the protection differs to some extent, this view also associates the money laundering offence with the protection of diverse legal interests and brings into the fore the broad conceptualisation of security, which is considered as a separate interest meriting protection by the criminal law.

In a similar preventive logic, another view has put forward that the purpose of the money laundering offence is not to permit the offender to take part in the licit economic life.[14] Along with general rule of law protection considerations, this view

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[11] Deutsche Bundestag, *op. cit.*, p.27.
[12] See K. Oswald (1997i), *Die Implementation gesetzlicher Massnahmen zur Bekämpfung der Geldwäsche in der Bundesrepublik Deutschland. Eine empirische Untersuchung des para. 261 StGB i. V. m. dem Geldwäschegesetz*, Iuscrim, Freiburg I. Br., p. 63. Oswald provides an excellent overview of the doctrinal views regarding the rationale of the money laundering offence.
[13] Oswald, *op. cit.*, p.61, referring to Barton, StV 3/1993, p.160.
[14] Oswald, *op. cit.*, citing Salditt, StV- Forum 4/1992, p.121.

highlights the need to protect the soundness of the financial system,[15] bringing thus into the fore the 'economic' single market considerations of the money laundering directive.

Money laundering is thus viewed as a security threat, its criminalisation deemed necessary in order to counter it. Placed within this broad security logic, its rationale transcends the 'property' justification of receiving: the money laundering offence serves to counter a much more extended and varied range of threats, and is considered as protecting interests as wide as security *per se*. At first sight, this stands in contrast with the choice of many national legislatures not to create a separate money laundering offence, but to include it in the receiving offence,[16] or to place it as a variant of receiving in the same systematic section of the criminal code under 'property crimes'.[17]

In addition to that, further objections can be raised on the actual link of the money laundering offence with the wide range of interests at stake. Money laundering is *a means* of retaining criminal proceeds, and its criminalisation forms part of a strategy to deprive the offender of their enjoyment, while possibly deterring her from the commission of further offences. In this light, the threat of money laundering to the interests protected by the predicate offences, and going beyond a property logic, such as human life or public order, appears only indirect, if not tenuous. This is especially the case in view of the separation between the predicate and money laundering and the professionalisation of the latter. The only concrete link that can be established is that of protection of the financial system

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[15] E.-J. Lampe (1994), 'Der neue Tatbestand der Geldwasche (para. 261 StGB)' in *Juristenzeitung*, vol.48, no.3, p. 125.

[16] In this context, see the cases of Denmark and the Netherlands. In the Netherlands however, the legislation is being amended to include a separate money laundering offence to be inserted by new article 420bis of the Penal Code, expected to take effect by mid 2000. This amendment has been incited by parallel developments in other countries and the acknowledgment that the existing fencing provisions are not adequate in combating money laundering, especially in cases where the same person has committed both the predicate offence and money laundering. See MOT, *Newsletter no.12*, July 1999 and *Annual Report 1999*, Ministry of Justice.

[17] See for instance the case of Greece. For an overview of the situation in the member states, see Commission of the European Communities, *Second Commission Report to the European*

and thus of economic life, should this be elevated to an equivalent status with interests such as human life.

The association of the money laundering offence with the protection of a multitude of interests placed together under the security banner is problematic to a further extent: through the emotionally charged discourse of imminent threat and the absolute equation of money laundering with organised crime in this respect, the criminalisation of the former is justified to protect not so much specifically delimited interests, but rather abstract, collective values such as the social fabric and, in its all-encompassing form, security itself. This shift is particularly dangerous in that legal certainty and the strict protective limits of the criminal law are challenged, and has the potential to lead in what has been called the *'dynamisation'* of legally protected interests, a phenomenon marked by the production of such interests 'from above'.[18] As will be seen in the context of the money laundering offence, this phenomenon has a significant impact on traditional criminal law principles that have to be bent in view of the perceived urgency in protecting these interests.

4. *ACTUS REUS*

According to the directive, the conduct that is described as money laundering consists of: the conversion or transfer of property; the concealment or disguise of its origin; its acquisition, possession or use; and the participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of these acts.[19] In their vast majority, these acts constitute at first sight commonplace behaviour which takes place in everyday, ordinary commercial transactions. Viewed on its own, the *actus reus* of the offence is thus

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Parliament and the Council on the implementation of the Money Laundering Directive, COM(1998)401 final, Brussels,1.7.1998, annex 4.

[18] *'Dynamisation des biens juridiques'*: term used by A. Baratta (1991), 'Les Fonctions Instrumentales et les Fonctions Symboliques du Droit Pénal' in *Déviance et Société*, vol.15, no.1, p.9. See also chapter 1.

[19] Article 1, indent 3.

not only commonplace, but also, as Abrams notes, 'outwardly innocent behavior-engaging in an ordinary bank transaction'.[20] What renders this behaviour punishable is purely the mental state of the offender.

This extension of criminalisation is also reflected in the all-embracing terminology of the provision with regard to acts constituting money laundering. No interpretative guidance is given regarding the exact meaning and delimitation of terms such as the transfer, acquisition, possession or use of property, or assistance and participation. This silence has led to expansive interpretations: in England and Wales, the Criminal Justice Act 1988, as amended by Criminal Justice Act 1993, criminalises the following conduct as, or related to money laundering: assisting another to retain the benefit of criminal conduct (section 93A); the acquisition, possession or use of proceeds of criminal conduct (section 93B); concealing or transferring proceeds of criminal conduct (section 93C); and tipping off (section 93D).[21]

Section 93A(1)(a) focuses on assistance when the retention or control by or on behalf of another ('A') of A's proceeds of criminal conduct is *facilitated* (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise).[22] This wording is used in identical manner in the 1994 Drug Trafficking Act, covering proceeds of drug trafficking only and has the potential to broaden considerably the scope of the money laundering offence, as the term 'facilitation' is open-ended and subject to a wide range of interpretations. The

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[20] Abrams, *op. cit.*, p.35.

[21] This Act is not the only one containing provisions on money laundering offences. Parallel enactments are: the Drug Trafficking Act 1994; the Prevention of Terrorism (Temporary Provisions) Act 1989; and the Northern Ireland (Emergency Provisions) Act 1991. All three Acts introduce a further offence of failure to disclose knowledge or suspicion of money laundering, related only to drug trafficking and terrorism (sections 52, 18A and 54A respectively). In Scotland, the Act in force is the Criminal Law (Consolidation) (Scotland) Act 1995, sections 38-40. For a detailed analysis of the content and interplay between these pieces of legislation see: B.A.K. Rider, 'Taking the Profit Out of Crime', G. Bhattacharyya and E. Radmore, "Fighting Money Laundering-A United Kingdom Perspective'and N. Clark, 'The Impact of Recent Money Laundering Legislation on Financial Intermediaries', all in B. Rider and M. Ashe (eds.) (1996), *Money Laundering Control*, Round Hall/Sweet and Maxwell, pages 1-27, 101-115 and 116-141 respectively.

[22] Emphasis added.

interpretative attempt provided in the parenthesis does not achieve much in terms of legal clarity, as the same open-ended character applies to the terms used therein, and the list is non-exhaustive.

These issues have been addressed in a recent Court of Appeal case, involving the change of money at a *bureau de change*.[23] The appelant, convicted under the aforementioned section of the Drug Trafficking Act in the first instance, appealed against his conviction arguing that the word 'facilitated' was given a particular meaning by the words in the parenthesis, and essentially meant 'concealment', not being able thus to cover the exchange of small sums of money at a *bureau de change*. The argument was rejected by the Court, as it was held that the reason or purpose behind the conversion of proceeds in that case are not relevant, as the offence is committed if there is facilitation of retention or control with no further reference to purpose. In this resolute attempt to broaden the meaning of facilitation, the Court acknowledged the all-embracing potential of the 'assisting' offence. The outcome is, on the one hand, the criminalisation, subject to the appropriate *mens rea* requirements, of a series of small sum every day financial transactions. The abandonment of the requirement of 'purpose' of conversion furthermore departs from the view of money laundering as a process of transforming the nature of criminal proceeds and extends 'assisting' to a general receiving offence, only with stricter penalties.

Similar issues arise regarding the definition of criminal proceeds, with the directive adopting the broadest possible approach in including 'assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interests in such assets'.[24] The broad character of the provision and the lack of any limits in time or otherwise, has the potential to lead to an over-extension of the offence to

[23] *R. v. MacMaster*, reported in *Criminal Law Review* (1999), pp.310-311.
[24] Article 1, indent 8.

cover a never ending chain of acts,[25] and, at the same time, a never ending chain of offences.[26]

A further matter that has proved to be controversial is the criminalisation of own funds money laundering. The directive is silent in this respect, as is the Vienna Convention. In a commentary drafted ten years after the signature of the latter, it was stated that whereas its language, and in particular the reference to the transfer of property, can be applied to the person who commits the predicate offence, some take the contrary view perceiving money laundering as a distinct offence committed in aid of the predicate.[27] Acknowledging this assertion, the Strasbourg Convention states, in article 6(2)(a), that it may be provided that the money laundering offences set forth in paragraph 1 of the same article do not apply to the persons who committed the predicate offence.[28] The controversy is visible in EU member states. While in England and Wales own funds money laundering is explicitly criminalised,[29] in other countries this is not possible as it is contrary to

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[25] G.Arzt(1993), 'Geldwäsche und rechtsstaatlicher Verfall' in *Juristenzeitung*, vol.48, no.19, p.914 and Oswald, *op. cit.*, p.65.

[26] On a criticism of the broadness of the offence in Belgian law, see F.Verbruggen (1997), 'Proceeds-oriented Criminal Justice in Belgium: Backbone or Wishbone of a Modern Approach to Organised Crime?' in *European Journal of Crime, Criminal Law and Criminal Justice*, vol.5, no.3, pp.314-341. Verbruggen refers to interviews with a series of money laundering specialists in academia and the legal profession. Their concerns are worthy of being quoting at length: 'The broad criminalization will, in their opinion, inevitably lead to arbitrary decisions. They also point out that, since the prescription of the predicate offence is irrelevant to the 'derivative' laundering offence, 505 P.C.[the Belgian Penal Code provision establishing the money laundering offence] is actually retroactively 'contaminating' goods or fortunes. It does not take a cynic to realise that almost all major fortunes have at least partially a criminal origin, be it tax fraud, corruption, the violation of economic or social legislation. Any offence anywhere in the world at any time in the past can be the predicate crime for a 505P.C. offence'. Page 328, at note 61.

[27] United Nations (1998), *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, New York, paragraph 3.42.

[28] According to the Explanatory Memorandum of the Convention, paragraph 2.b takes into account that in some states the person who committed the predicate offence will not, according to basic principles of domestic penal law, commit a further offence when laundering the proceeds.

[29] See section 93C(1) of the 1988 Criminal Justice Act, which treats as an offence concealing or transferring proceeds of one's own criminal conduct. As this conduct is punishable if done for the purpose of avoiding prosecution, it can be argued that the interest protected by criminalisation here is the smooth functioning of the criminal justice system and the maintenance of the rule of law, rather than interests linked with the dangers from the predicate offences or the protection of the financial system. In a similar vein, Brown argues that if the purpose of the offender is solely commercial in nature, he falls outside the scope of the provision. A. Brown (1996), *Proceeds of Crime. Money Laundering, Confiscation and Forfeiture*, W.Green/Sweet and Maxwell, Edinburgh, p.130.

fundamental criminal law systematisations and principles, such as the principle of *ne bis in idem*: money laundering is viewed as an activity so closely linked to the predicate offence, that it cannot be viewed as a separate activity related to the same person.[30]

5. *MENS REA*

The directive prohibits money laundering under two general conditions: that it is intentional and that there is knowledge that the property is derived from criminal activity or from an act of participation in such activity.[31] The directive, following the United Nations and Council of Europe Conventions,[32] further provides that intent and knowledge may be inferred from 'objective factual circumstances'. Although this reference constitutes an interpretative tool of limited assistance in its broadness, the express wording of the directive, along with the choice not to follow the Strasbourg Convention in giving the opportunity to member states to extend the *mens rea* into negligent behaviour,[33] provides an indication of the delimitation of the *mens rea* requirement to knowledge.

At the same time however, the directive, in a general clause, allows the member states to adopt or retain stricter provisions than those set out by it to prevent money

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[30] Such concerns have been repeatedly raised for instance in Greece: see C. Stefanou and H. Xanthaki (1999), 'Greece: Money Laundering', in *Journal of Money Laundering Control*, vol.3, no.2, p.163. On an extensive analysis on the other hand of the situation in the Netherlands, see C.D. Schaap (1998), *Fighting Money Laundering with Comments on the Legislation of the Netherlands Antilles and Aruba*, Kluwer Law International, London, The Hague, Boston, pp.63-66. The author provides an overview of the doctrinal and jurisprudential evolution of the principle that 'the thief cannot receive stolen property' and examines its applicability in the money laundering offence, moulded under the receiving model. It is interesting to note, however, that the Dutch legislation is being revised and new article 420 *bis* to be inserted in the criminal code sometime in 2000 will provide for separate criminalisation of money laundering: see supra, note 17.

[31] Article 1, indent 3. In addition to these requirements, the directive establishes that, in the case of conversion or transfer of property, this must occur 'for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action'.

[32] Articles 3(3) and 6(2)(c) respectively.

[33] Article 6(3)(a) of the Convention allows for the extension of the money laundering offence in cases where the offender 'ought to have assumed' that the property was criminal proceeds.

laundering.[34] An example of application of this article concerning the *mens rea* element of the offence is the case of Germany: article 261(5) of the criminal code criminalises money laundering also in cases where somebody does not recognise the criminal origin of the proceeds due to a high degree of negligence (*leichtfertigkeit*). According to the interpretation put forward in the German Parliament, negligence is viewed as equivalent to the 'gross carelesness' in civil law, where subjective criteria such as personal knowledge and abilities are used to assess the foreseeability of the harm that was caused. The test for this degree of negligence is satisfied when somebody leaves out of attention the possibility of the commission of an offence due to particular carelessness or indifference on their behalf.[35]

The extension of the *mens rea* requirement to cover cases of negligence was deemed indispensable by the German legislator in order to overcome obstacles in

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[34] Article 15.

[35] Drucksache, *op. cit.*, p.28. See also a commentary on the German Penal Code: K. Lachner (herausg.) (1995), *Strafgesetzbuch*, C.H. Beck'sche Verlagsbuchhandlung, Munich, paragraphs 15/55 and 261/9. In German criminal law, where there is no intermediate stage between intention and negligence, the concept of *leichtfertigkeit* is classified as a high degree of negligence. This element brings into the fore conceptual similarities with the concept of gross negligence in English criminal law, as both cases are marked by a substantial departure from a degree of care. However, the implicit indifference in *leichtfertigkeit* to protected interests that is implied by the interpretation put forward in the German Parliament, highlights also conceptual similarities with the concept of recklessness. Notwithstanding the controversy regarding the analytical clarity of objective and subjective criteria for distinguishing between negligence and recklessness, the prominent use of subjective criteria in assessing *leichtfertigkeit* brings into mind subjective assesments of reckless behaviour (For excellent critical analyses on the concepts, see *inter alia* R.A. Duff (1990), Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law, Basil Blackwell, Oxford, U.K. and Cambridge, MA, USA; J. Horder (1997), "Gross Negligence and Criminal Culpability' in *University of Toronto Law Journal*, vol.XLVII, no.4, pp.495-521). It is interesting to note here that German commentators have not translated *leichtfertigkeit* in a uniform manner: while Oswald makes a catchall reference to negligence (K. Oswald (1997), 'Money-Laundering Legislation in Germany: Selected Results from a Recent Research Project' in *European Journal of Crime, Criminal law and Criminal Justice*, p.197), Lipp avoids specification by referring to criminal liability where someone 'ought to have realised that the property was the proceeds of a predicate crime' (V. Lipp (1999), 'Germany' in B. Rider and Ch. Nakajima (eds.), *Anti Money Laundering Guide*, CCH Editions, paragraph 91,000). Ernesto Savona on the other hand translates *leichtfertigkeit* borrowing the civil law concept of 'gross carelessness', meaning 'a very high degree of negligence, comparable with recklessness': E. Savona (in co-operation with F. Manzoni) (1999), *European Money Trails*, Harwood Academic Publishers, Australia, Canada, China, France, Germany, India, Japan, Luxembourg, Malaysia, the Netherlands, Russia, Singapore, Switzerland, p.60. The thin line between negligence and recklessness, along with the express inclusion of *leichtfertigkeit* as a higher form of negligence in the systematic framework of the German Penal Code (see article 15) dictate the use of the generic term of negligence in this chapter.

the production of evidence of money laundering and to achieve thus the effective prosecution of the offender.[36] The production of evidence is also linked with the general difficulty in proving the intent of offenders in money laundering cases, especially in view of the increasing professionalisation of money laundering, leading in many cases to the absence of direct involvement of launderers in the commission of the predicate offence.

The extension of *mens rea* to negligent money laundering has been strongly criticised. It has been observed that while such an approach was traditionally an exceptional phenomenon, it has increasingly become common in the fight against economic crime. The criminalisation of negligence is viewed as contrary to the constitutional principle of *nullum crimen sine culpa* (*Strafschuldprinzip*) and calls have been made to the addition to the money laundering offence of precise circumstances which ground suspicion (*Verdacht*).[37]

The unconstitutionality argument was tested in the German Constitutional Court on two grounds: the opposition of the negligent money laundering offence to the principle of *nullum crimen sine culpa* (*Schuldprinzip*); and its opposition to the principle of legal certainty. In its ruling, the Court upheld the constitutionality of the provision as to the first challenge by reiterating the overarching need to overcome evidentiary difficulties; in this context, the extension of the money laundering offence to include negligence was deemed indispensable to achieve the goals set by the legislation. On the second ground, it was held that the legal certainty principle was not affected, as the money laundering offence is to be interpreted to include a form of culpability which lies close to intentional conduct. [38] In an attempt to reconcile the reactions to the extension of the offence to negligent behaviour with the policy need for draconian legislation, the Court thus attempted to limit the applicability of the law, in a strong contrast with the systematic distinction between intention and negligence.

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[36] Drucksache, *op. cit.*, p.27.
[37] Lampe, *op. cit.*, p.129.
[38] See *Neue Juristische Wochenschrift* (1997), vol. 49, pp. 3323-3326.

The debate on the extension of liability for money laundering is prevalent also in cases where only intentional conduct is criminalised. In such cases, the debate lies in delicate distinctions between levels of knowledge. In Italy, for instance, academic opinion is divided on whether reckless knowledge is punishable under the money laundering offence. While one view asserts that uncertainty as to the origin of the proceeds along with intention to perform the conduct is punishable as a laundering offence, the opposing view puts forward the element of 'constructive intention' rather than reckless knowledge: it is argued that since money laundering is a conduct crime, the *mens rea* is linked to the mere intention to perform the designed conduct. The mental state of uncertainty can thus simply indicate negligent conduct. This argumentation was followed by the Tribunal of Florence which held that:

> 'The prospect of the illicit provenance from crime as a mere possibility...colours the conduct, at the most, with the connotation of negligence with particular reference to the transgression of the duty to report suspicious transactions; in this case the mens rea of money laundering does not appear correctly conceivable because it requires that the accused intends to operate on money deriving from crime: it implies the actual knowledge and not the simple doubt with respect of the origin of the assets'.[39]

The difficulties in the exact delimitation of the knowledge element are evident also in the law of England and Wales. An attempt at definition and contrast with the element of suspicion has been made in the context of interpreting handling of stolen goods in section 22(1) of the Theft Act 1968. In the leading case of *R. v. Hall* in the Court of Appeal, the following were noted by Boreham J.:

> 'A man may be said to know that goods are stolen when he is told by someone with first hand knowledge (someone such as the thief or the burglar) that such is the case. Belief, of course, is something short of knowledge. It may be said to be the state of mind of a person who says to himself: "I cannot say I know for certain that these goods are stolen, but there

[39] Decision 894/95 of 10.10.1995, cited in Zaccagnini, *op. cit.* The author provides an extensive analysis of the issue in Italian law.

> can be no other reasonable conclusion in the light of all the circumstances, in the light of all that I have heard and seen." Either of those two states of mind is enough to satisfy the words of the statute. The second is enough (that is, belief) even if the defendant says to himself: "Despite all that I have seen and all that I have heard, I refuse to believe what my brain tells me is obvious". What is not enough, of course, is mere suspicion. "I suspect that these goods may be stolen, but it may be on the other hand that they are not." That state of mind, of course, does not fall within the words "knowing or believing".[40]

The definitional difficulties regarding the element of knowledge have led to calls for its interpretation in a broad manner, in order to facilitate the task of the prosecution in money laundering cases. According to a recent analysis, such steps could include: the requirement that knowledge is inferred from objective circumstances; the inclusion in the definition of knowledge of the concept of 'wilful blindness'; and the delimitation of the *mens rea* not solely by the subjective intent of the defendant, but also of the objective circumstances surrounding the case. Money laundering is thus established in cases where the defendant either knew or reasonably ought to have known that the money in question was the proceeds of crime.[41] This approach mirrors to a great extent parallel calls to transplant interpretations of knowledge on the basis of the case-law on constructive trusts in the criminal law sphere in order to include a broadly defined concept of wilful blindness. [42]

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[40] (1985) 81 *Cr. App. Rep.* 260, at 264. The extract is cited and further analysed in W.C. Gilmore, 'The New U.K. Anti-Money Laundering Laws: Impact and Concerns', unpublished paper presented in the First British Virgin Islands Due Diligence and Compliance Conference, Tortola, 9-11 March 1998.

[41] R.E. Bell (1999), 'Prosecuting the Money Launderers Who Act for Organised Crime' in *Journal of Money Laundering Control*, vol.3, no.2, p.107. The author is of the Department of the Director of Public Prosecutions, Royal Courts of Justice, Belfast.

[42] C. Howard (1998), 'The *Mens Rea* Tests for Money Laundering Offences-1' in *New Law Journal*, December 4, pp.1818-1819. The article distinguishes the following categories of mental states that constitute knowledge:(a) actual knowledge, (b) wilfully shutting one's eyes to the obvious, (c) wilfully and recklessly filing to make such enquiries an honest and reasonable man would make, (d) knowledge of circumstances which would indicate the fact to an honest and reasonable man, and (e) knowledge of circumstances which would put an honest and reasonable man on enquiry. On the basis of the case *Baden Delvaux v. Société Génerale* (1992) and two other cases on constructive trusts, the author argues that knowledge in money laundering can be extensively interpreted to include all five stages. This view is supported notwithstanding the existence of subsequent case-law, such as the case *Royal Brunei Airlines v. Tan* (1995): in that constructive trust case, which involved 'dishonest assistance in breach of trust', the Court opted for the seemingly more limited test of 'conscious impropriety', and called for the imputation of knowledge on the basis of an objective evaluation of the circumstances of the case and the personal

The efforts to adopt a broad anti-money laundering framework have also led to the addition of the element of suspicion in the *mens rea* of a number of offences constituting or related to money laundering. This has happened in the cases of assisting another to retain the benefit of criminal conduct and tipping off.[43] The requirement is more stringent in the offences of concealing or transferring proceeds of drug trafficking of a third person, and of assisting another to retain proceeds of terrorist-related activities: there, the element of knowledge is accompanied by the defendant having 'reasonable grounds to suspect' the origin of the property from drug trafficking in the first case and engagement in terrorist activities in the second.[44] In view of the aforementioned reservations in extending the knowledge element to cover forms of negligence, the inclusion of the broad element of suspicion comes as a sharp contrast to the attempts of achieving legal certainty in the delimitation of the money laundering offence and has been heavily criticised.[45]

An attempt to interpret the context and inclusion of suspicion has been made by Rider, who stated that the latter was included in the money laundering legislation

> 'to cover the situation where a person deliberately chooses not to carry out an investigation into the source of the funds. Obviously, it must be proved that he was suspicious in the first place as to the status of the person whom he is dealing. Where he is suspicious that this person has carried on [criminal conduct] or has benefited from doing so, then to

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characteristics of the individual concerned. The necessity and conceptual clarity of transplanting concepts of trusts to the distinct field of criminal law is however dubious and can prove detrimental in protecting fundamental principles which must be guaranteed in the criminal law process. For similar reactions regarding the use of criminal law concepts in interpreting money laundering in cases of equity and trusts, see S. Gleeson (1995), 'The Involuntary Launderer: the Banker's Liability for Deposits of the Proceeds of Crime' in P. Birks, *Laundering and Tracing*, Clarendon Press: Oxford, pp.115-133, especially pp.132-133.

[43] Sections 93A and 93D of Criminal Justice Act 1988 as amended by the Criminal Justice Act 1993.

[44] Section 14(2) of Criminal Justice (International Co-operation) Act 1990 and section 53(1)(b) Northern Ireland (Emergency Provisions) Act 1991.

[45] On an analysis of the inclusion of suspicion in the Criminal Justice Act see Ch. Howard (1999), 'The *Mens Rea* Test for Money Laundering Offence-2' in *New Law Journal*, January 8, p.28. Both parts have also appeared as C. Howard (1998), 'The Mens Rea of the Money Laundering Offences in Part VI of the Criminal Justice Act 1988' in *Butterworths Journal of International Banking and Financial Law*, December, pp.514-517. On criticisms of this option see J. Wadsley (1994), 'Money Laundering: Professionals as Policemen' in *The Conveyancer*, pp.275-288.

> escape liability he will have to prove that the funds do not come from such a crime or that he has the benefit of a statutory defence'.[46]

The element of 'deliberately choosing' not to investigate the origin of the money strongly resembles conceptions of reckless money laundering and the inclusion of suspicion may thus counter-balance a strict interpretation of the knowledge element. The potential of an over-extension of the money laundering offence thus still remains. At the same time, Rider's analysis brings into the fore a parallel challenge to principles of procedure in criminal law: the reversal of the burden of proof.

6. BURDEN OF PROOF

A further pressure towards the enhancement of prosecutorial powers in money laundering trials is reflected in calls arguing in favour of the reversal of the burden of proof in these cases. These calls are justified on the premises that information related to the origin of the proceeds falls within the defendant's knowledge, which renders the proof of their illegal origin too onerous a task for the prosecution.[47] Issues of burden of proof in money laundering cases were raised in the United Kingdom for the first time prior to the adoption of the directive. In a leading case in England, the Court of Appeal ruled on section 24 of the Drug Trafficking Offences Act 1986, which criminalised forms of money laundering from drug trafficking. Subsection 4 stated that

> 'in proceedings against a person for an offence under this section, it is for the defence to prove-(a) that he did not know or suspect that the arrangement related to any person's proceeds from drug trafficking, or (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1) above [which described the offence]'.

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[46] B. Rider (1992), 'Fei Ch'ien Laundries-the Pursuit of Flying Money (part II)' in *Journal of International Planning,* vol.1, no.3, p.144, cited in Howard, 1999, *op. cit.*
[47] Bell, *op. cit.*, p.108.

Against the heavy burden of proof that this provision places on the defendant, the appelant argued that the burden of proof is shifted from the prosecution to the defence only in limited cases and such shift requires, in the case of statutes, clear language. The first instance judge, on the other hand, interpreted the provision as leaving the prosecution to disprove the matters alleged in section 24(4), rather than for the defendant to prove them.

The Court did not accept either argument. In a balancing attempt, a distinction was made between section 24(1), which establishes the *mens rea* of the offence, and section 24(4) on defences. It was held that while it is for the prosecution to prove the state of knowledge required in accordance with the normal standard of proof, it is for the defendant, should he wish to use the defence of subsection 4, to prove, on the balance of probabilities, the matters set out therein.[48] This distinction was reiterated in another common law case in Hong Kong, which centred on the compatibility of the local drug trafficking legislation with the Hong Kong Bill of Rights. It was held that the defences were not included in the substance of the offence and that the onus of proof was on the defendant. The shift of the onus was judged 'manifestly reasonable' in the context of the war against drug trafficking.[49]

This distinction was upheld in a post-money laundering directive case. The Court of Appeal ruled on section 93A of the 1988 Criminal Justice Act, which reiterated the wording and structure of the 1986 Drug Trafficking Offences Act on defences. It was held on the one hand that the *mens rea* of the offence was knowing or suspecting that the other was a person who was or had been engaged in or had benefited from criminal conduct, and the onus of proof remained on the prosecution to prove that state of mind. The Court however acknowledged that in

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[48] Case *Valerie Anne Colle*, Court of Appeal, July 22-25 1991, (1992) 95 *Cr. App. R.*, p. 68.
[49] Cases *Attorney General of Hong Kong v. Lee Kwong-kut and Attorney General of Hong Kong v. Lo Chak-man and another*, Privy Council 22-25.3/19.5.1993, (1993) 3 *All.E.R.*, p.953. It is interesting to note here that the case distinguished the burden of proof in cases of drug trafficking from cases of receiving, with the former having an additional legitimacy weight in the balance with human rights.

the particular case, 'that which the prosecution had to prove to establish the *mens rea* of the offence was the same as B would have had to prove to establish the statutory defence'.[50]

This statement is the most vivid illustration of the deterioration of the defendant's position in money laundering trials, caused by the distinction between substantive and procedural elements of the offence. As the distinction is- in many money laundering cases- virtually impossible to make,[51] the reversal of the burden of proof extends in reality beyond strictly delimited defences, to cover the substantive elements of the money laundering offence. This tendency is inextricably linked with the broadening of the *mens rea* to include suspicion, an element which is both vague and difficult to prove. The difficult mission to prove knowledge or suspicion of criminal activity or illicit origin is thus transferred from the prosecution to the defendant, who, far from presumed innocent, is under the obligation to prove the absence of knowledge or suspicion. In this manner, fundamental defence rights are violated in order to facilitate the prosecution's task in the war against organised crime.[52]

7. PREDICATE OFFENCES

As seen above,[53] the directive followed a minimum standard approach in prohibiting money laundering of proceeds only from drug trafficking, as defined in article 3(1)(a) of the UN Vienna Convention, but at the same time leaving to

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[50] Case *R. v. Butt*, reported in *Criminal Law Review* (1999), pp.414-415, p.415.

[51] To take the example of *R. v. Butt*, the Court stated that 'substantial' elements were the knowledge or suspicion that one is engaged in criminal conduct, whereas defences were the knowledge or suspicion that the arrangement related to any person's proceeds of criminal conduct.

[52] Similar objections on the reversal of the burden of proof, focusing on its unconstitutionality with respect of the principles of presumption of innocence and protection of property were raised in Germany, where similar 'reversal' calls were made at the Parliamentary level. See Oswald,(1997ii), p.201. See also SPD-Gesetzentwurf, 'Entwurf eines Zweiten Gesetzes zur Bekampfung des Illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalitat (2. OrgKG), in *Drucksache* 12/6784, 4.2.1994.

member states the discretion to include in the scope of the offence proceeds from any other criminal activity.[54] This choice resulted in considerable divergencies in national definitions of money laundering. While in a number of states money laundering covers proceeds from a specific and restrictively enumerated list of offences, differing from state to state, others, such as the United Kingdom, have opted for the criminalisation of the laundering of proceeds from 'all serious crime'.[55]

These discrepancies cause a series of legal certainty issues, especially in view of the extension of the directive to cover money laundering 'even where the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in that of a third country'.[56] Along with the inherent difficulties with regard to the diverging definitions of the same crime in the various EU member states, further issues arise here regarding to the choice of national standards in defining the money laundering offence. Would for instance the laundering of proceeds from a serious crime committed and punished as such in the United Kingdom, be also punishable if prosecuted in another state where this offence is not included in the money laundering scope? These issues have important implications for the national and international exchange of financial information, as there is no common definition of money laundering. In this context, the European Parliament called recently for special attention to be paid in preventing the emergence of a 'variable geometry version of European criminal law', in particular regarding the definition and nature of the money laundering predicate offences.[57]

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[53] See chapter 3.
[54] Article 1, indent 5.
[55] For a discussion on the implementation of the directive in this respect, see chapter 3. For a recent overview of the situation in member states, see Commission of the European Communities, 1998, *op. cit.*
[56] Article 1, indent 3 *in fine*.
[57] European Parliament, Committee on Civil Liberties and Internal Affairs, *Report on Criminal Procedures in the European Union (Corpus Juris)*, rapporteur: J.-K. Wiebenga, DOC. A4-0091/99, 8.3.1999, p.12.

These issues have partly been addressed at the European Union level by means of legislation adopted under the auspices of the Justice and Home Affairs pillar. A prime example is the Second Protocol of the EU fraud Convention, known as the 'money laundering' protocol.[58] According to articles 1(e) and 2, member states are called to establish as a criminal offence money laundering related to the proceeds of fraud, at least in serious cases, and of active and passive corruption. This initiative is an outcome of the recognition of all three offences, de jure or de facto, as EU crimes, and the first step in acknowledging and addressing their interdependence.[59]

A further extension to the scope of the money laundering offence was brought into the fore by the Joint Action on money laundering, the identification, tracing, freezing and confiscation of the instrumentalities and the proceeds from crime.[60] Article 1(b) calls upon member states to ensure that no reservations are made to article 6 of the Council of Europe Convention, which establishes and delimits the money laundering offence, 'in so far as serious offences are concerned'. In this indirect manner, the Joint Action ensures the criminalisation of money laundering from all serious crime.

Such initiatives were coupled with rapid developments in the EU policies aimed at countering organised crime. In this effort, the link between organised crime and money laundering was established and calls were made for the extension of the scope of the money laundering offence. In this context, Recommendation 26(b) of the Action Plan to Combat Organised Crime calls for criminalisation of money laundering to be made as general as possible. [61] The European Parliament on the

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[58] Second Protocol of the Convention on the Protection of the European Communities' Financial Interests, OJ C221, 19.7.1997, p.11.
[59] For an analysis of the interdependence between fraud, money laundering and corruption, see E.U. Savona (1998), *La Criminalitá Economica in Europa. Le Interdipendenze tra Frodi, Riciclaggio e Corruzione*, TRANSCRIME Working Paper no.28, October 1998.
[60] OJ L333, 9.12.1998, p.1.
[61] OJ C251, 15.8.1997, p.1 at p.15.

other hand, called for the extension of money laundering to all proceeds from professional and organised crime.[62]

These developments are reflected to a certain extent in the recent Commission proposal for a new money laundering directive.[63] Wary of the controversy relating to the Community's competence in the field of criminal law, the Commission retains the clause on the prohibition, rather that the criminalisation of money laundering. New draft article 1(e) however provides that the offence includes, along with drug trafficking, proceeds from at least: fraud, corruption or any other illegal activity damaging or likely to damage the EC's financial interests; and participation in activities linked to organised crime. The provision also includes any other criminal activity designated as such for the purposes of the directive by the member states.

It is interesting to note here that the directive has not followed the example of the Joint Action on confiscation which indirectly obliges member states to criminalise money laundering from serious crime. According to the Commission, such an extension of the scope of the offence would be too burdensome for the institutions and persons which are under the duty to report suspicious transactions, especially in view of the inclusion of a series of non-financial activities in the draft directive. On the other hand, it was deemed easier, in practical terms, for these persons and institutions to link their suspicions to organised crime activities, rather than to assess the seriousness of the underlying offence.[64] It must be noted however that in this case the difficulties in providing a coherent legal definition of organised crime and the mystification surrounding the use of the term may lead to reports based on a wide range of behaviour not necessarily constituting an

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[62] European Parliament, Committee on Legal Affairs and Citizens' Rights, *Report on the first Commission's report to be submitted to the European Parliament and to the Council on the implementation of the Directive on the prevention of the use of the financial system for the purpose of money laundering (91/308/EEC),* rapporteur: K.-H. Lehne, DOC. A4-0187/96, 6.6.1996, p.5.
[63] Commission of the European Communities, *Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering*, COM(1999)352 final, Brussels, 14.7.1999.
[64] Commission, 1999, p.7.

organised crime activity. At the expense of legal certainty, this may potentially lead to the disassociation of the reporting obligation from legally prescribed predicate offences.

In view of the increasing obligations incumbent on the private sector under the directive, the Commission's choice to avoid a catch-all definition of predicates is to be welcomed. Its soundness however can be easily undermined by the choice of member states to add further predicates to the offence, while maintaining a more restricted approach with regard to reporting duties. The issue was recently highlighted in England and Wales, where money laundering covers the proceeds of all crime, but the reporting obligations extend only to proceeds from drug trafficking and terrorism.[65] it was put forward that this discrepancy creates a gap in the anti-money laundering defences and calls have been made for the creation of an all-crime 'failure to disclose' offence.[66]

Discrepancies between the money laundering offence and the definition of laundering for reporting purposes have also serious implications for information gathering and exchange, as the information provided may be used to investigate and prosecute ultimately a different predicate offence than the one initially reported. This is very probable in cases of controversial predicate offences, such as those related to tax matters. These offences are not included in the catalogue of predicate offences in any of the aforementioned international or EC/EU legal instruments, with the situation remaining the same in the Commission's draft. At the same time however, pressure has been exercised by the Financial Action Task Force for tax offences to be taken into account by financial institutions at the reporting stage.[67]

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[65] See *supra* in the part on *actus reus*.
[66] Home Office, Organised and International Crime Directorate, Working Group on Confiscation, *Third Report: Criminal Assets*, November 1998, paragraphs 3.3 and 3.4.
[67] See interpretative note to Recommendation 15, of 2.7.1999, stating that, in the implementation of the Recommendation, suspicious transactions should be reported by financial institutions regardless of whether they are also thought to involve tax matters.

Problems may also arise in cases when the institutions and persons involved are under the duty to report suspicions based on a limited category of predicate offences, while money laundering *per se* is criminalised on an 'all-crime' basis. This problem is exacerbated by the different definitions of money laundering in EU policing instruments, that is the Europol Convention[68] and the Convention on the use of information technology for customs purposes (CIS Convention).[69] The scope of the latter, which was initially centered to property or proceeds derived from drug trafficking,[70] has been recently extended by a Protocol to include a list of broad and diverse predicates within and beyond the customs sphere.[71] The broad scope of the Europol Convention on the other hand,[72] is to be extended further after the calls by the recent European Council at Tampere to extend its competence to

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[68] OJ C316, 27.11.1995, p.1.
[69] OJ C316, 27.11.1995, p.33.
[70] Article 1(1), indent 2.
[71] See Protocol drawn up on the basis of article K.3 of the Treaty on European Union, on the scope of the laundering of proceeds in the Convention on the use of information technology for customs purposes and the inclusion of the registration number of the means of transport in the Convention, (OJ C91, 31.3.1999, p.2). Article 1 adds to the scope of the Convention the laundering of proceeds derived from any infringement of: '(i).. all laws, regulations and administrative provisions of a Member State the application of which comes wholly or partly within the jurisdiction of the customs administration of the Member State concerning cross-border traffic in goods subject to bans, restrictions or controls, in particular pursuant to Articles 36 and 223 of the Treaty establishing the European Community, and non-harmonised excise duties, or (ii) the body of Community provisions and associated implementing provisions governing the import, export, transit and presence of goods traded between Member States and third countries, and between Member States in the case of goods that do not have Community status within the meaning of Article 9(2) of the Treaty establishing the European Community or goods subject to additional controls or investigations for the purpose of establishing their Community status, or (iii) the body of provisions adopted at Community level under the common agricultural policy and the specific provisions adopted with regard to goods resulting from the processing of agricultural products, or (iv) the body of provisions adopted at Community level for harmonised excise duties and for value-added tax on importation together with the national provisions implementing them'. The numbering of the Treaty articles refers to the Maastricht Treaty.
[72] Article 2 of the Convention includes: terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indicators that an organised criminal structure is involved and two or more member states are affected by the form of crime in question; (initially) unlawful drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime; (within two years from function) crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom and property; and illegal money laundering in connection with these forms of crime. Council Decision of 29.4.1999 (OJ C149, 28.5.1999), extended Europol's mandate to deal also with forgery of money and means of payment.

money laundering in general, regardless of the type of the offence from which the laundered proceeds originate.[73]

It thus appears that the delimitation of the money laundering offence in terms of its predicates is far from harmonised. This is largely due to attempts to reconcile national sovereignty claims related to criminal law competence on the one hand, and policy pressures towards an ever-broader definition of money laundering on the other.[74] As the directive has, even in its revision, adopted a minimum standard policy, discrepancies in national legislation remain acute. This is not alleviated by the tendency of member states to extend the offence to cover proceeds from all serious crime,[75] as the very definition of serious crime is a contested and vague concept, differing from jurisdiction to jurisdiction.

In a similar manner, the European Union initiatives contain a mosaic of money laundering definitions, tailored to serve different purposes.[76] The lack of clarity is reinforced in the draft new directive. Although the easy solution to refer to the

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[73] Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, paragraph 56. Downloaded from http://europa.eu.int/off/conclu/oct99/oct99_en.htm

[74] Revised Recommendation 4 of the Financial Action Task Force provides that each country 'should extend the offence of drug money laundering to one based on serious offences'.

[75] See the notable example of France, where law 96-392 of 13.5.1996 extended the scope of the money laundering offence to cover proceeds from all *'crimes'* or *'délits'*. For an overview of the situation in other member states, see Commission of the European Communities, 1998, *op. cit.*

[76] A further example is the list of predicates included in the draft Joint Action on Combatting Fraud and Counterfeiting of Non-Cash Means of Payment, downloaded from http://ue.eu.int. According to articles 3(1) and(5) and 2, reference is made to money laundering from: a. misappropriation of a payment instrument; b. counterfeiting or falsification of a payment instrument; c. knowingly handling, unauthorised by the holder, of a payment instrument; d. knowingly possessing a misappropriated, counterfeited or falsified payment instrument; e. knowingly using a misappropriated, counterfeited or falsified payment instrument; f. knowingly accepting a payment made under the circumstances covered by the previous indent; g. knowingly unauthorised use of identification data for initiating or processing a payment transaction; h. knowingly using fictitious identification data for initiating or processing a payment transaction; i. manipulation of relevant data including account information, or other identification data, for initiating or processing a payment transaction; j. unauthorised transmission of identification data for initiating or processing a payment transaction; k. unauthorised making, handling, possession or use of device making equipment for the purpose of:-.manufacturing or altering any payment instrument or part thereof;-initiating or processing payment transaction, or – changing or altering any information or data carried on, or in, any payment instrument or transaction; l. knowingly unauthorised possession of an element or part of a payment instrument; m. involvement as accessory or instigator in, or knowingly obtaining of value or pecuniary advantage derived from any of the behaviours described above involving a criminal intention.

broad, over-extending concept of 'all serious crime' has been avoided, the new predicates included remain extremely broad and vague: the directive is not limited to fraud and corruption, but aims at covering also 'any other activity damaging or likely to damage the European Communities' financial interests'. The other new predicate, on the other hand, is the participation not in a criminal organisation, but, more generally, in 'activities linked to organised crime'.

The inconsistencies in the EU policy in the field of predicate offences is further highlighted by the pressure posed by the European Union towards the adoption of a broad definition of money laundering in the currently negotiated United Nations Convention against Organised Crime. In the relevant Joint Position, it is put forward that the Convention 'should extend to a broad range of offences and, in particular, should be consistent with the 40 recommendations of the Financial Action Task Force'.[77] The latter, as seen in chapter 3 above, were revised in 1996 to call for the criminalisation of money laundering from serious offences.[78] At the same time, at the European Council level, the recent Tampere summit called for criminal law approximation and the establishment of broad money laundering predicates.[79]

It is interesting to see thus that, while at the political level, including its role as an international actor, the European Union pushes for a broad money laundering criminalisation, at EC level the Commission, wary of acute legal problems related to national criminal laws and EC competence in the field, ended up with a more limited and compromising draft. Legal certainty and consistency can thus be easily be undermined from the 'back-door', with member states ratifying the forthcoming

[77] Joint Position of 29 March 1999 defined by the Council on the basis of Article K.3 of the Treaty on European Union, on the proposed United Nations convention against organised crime, OJ L87, 31.3.1999, p.1. Article 1(5).
[78] Revised Recommendation 4 (ex 5), leaving to member countries to determine predicates on a 'serious crime' basis.
[79] Paragraph 55.

UN Convention potentially containing a broad money laundering definition, which will be possibly reiterated in forthcoming EU initiatives after the Tampere calls.[80]

In any case, the margin of discretion left in the member states regarding the interpretation and implementation of the draft directive provisions is broad. This is especially the case since, unlike drug trafficking, and in the case of the new directive, fraud and corruption, no guidance is offered regarding the delimitation of activities which damage EC financial interests or are linked to organised crime. The money laundering/organised crime nexus however brings furthermore a new conceptualisation of the money laundering offence, as money laundering *from* organised crime can be examined along with money laundering *as* organised crime. This is especially the case in view of the recent Joint Action on organised crime,[81] which criminalises participation in a criminal organisation established in view of committing, *inter alia*, money laundering offences.[82] This move may prove beneficial in view of the separation between the predicate offence and money laundering activities and the professionalisation of the latter. At the same time however, it brings to the debate on the money laundering offence the heavy burden of the criminalisation of organised crime, and the serious challenges to fundamental rule of law principles-such as *nullum crimen sine actu*- it entails.[83]

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[80] The latest draft of the UN Convention calls, at article 4,paragraph 1 *bis*, for the applicability of the laundering offence to the proceeds 'of those crimes associated with organized criminal groups and also to the proceeds of other serious crimes'. The same paragraph calls for the periodical review of domestic legislation implementing this article to ensure its application to 'an appropriately broad range of offences'. United Nations, General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft United Nations Convention against Transnational Organized Crime*, DOC. A/AC.254/4/Rev.5, 16.11.1999

[81] Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L351, 29.12.1998, p.1.

[82] Article 1, indent 2, referring to offences mentioned in article 2 of the Europol Convention and in the annex thereto and are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty.

[83] Article 2 of the Joint Action is an eloquent example of such challenges. It criminalises conduct rather than act, in the present case the participation in an organisation. Such participation ranges from involvement in criminal activities, or the organisation's other activities in order to achieve the criminal aims, to just an agreement to pursue an activity amounting to the commission of an offence. The detachment of such crimes from the act requirement is even more obvious in view of the fact that, in the first and third aforementioned cases, the conduct is punished even if the person involved does not take part in the actual execution of the offences/activities concerned, while in the first case conduct is punished even when the offence is not actually committed. This definition

8. LIABILITY OF LEGAL PERSONS

A heated issue related to the applicability of the money laundering offence concerns the imposition of liability to legal persons in this respect. Neither the Vienna nor the Strasbourg Conventions contained provisions on such liability. However, the recent commentary on the Vienna Convention acknowledged the advantages of imposing a system of liability for legal persons, as distinct from natural person liability, in cases where money laundering is pursued through them. It is stated that:

'For example, complex management structures can render the identification of the person or persons responsible for the commission of the offence difficult or impossible. In such cases the imposition of liability on the legal person may be the only option if the activity in question is not to go unpunished. Similarly a sanction imposed on an institution rather than an individual can act as a catalyst for the reorganization of management and supervisory structures to ensure that similar conduct is deterred'.[84]

Notwithstanding these justifications, the money laundering directive, even in its amended version, does not contain any provisions establishing liability of legal persons for money laundering. The latter however has been provided for, in relation to a limited number of cases, in the Second Fraud Protocol,[85] whose article 3(1) states that

'Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

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largely reflects the offence of conspiracy and association to commit offences, as delineated in article 3 of the EU Extradition Convention (Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, OJ C313, 23.10.1996, p.12). The offences covered in paragraph 4 of this article are mentioned, along with those set out by the Joint Action, in article 2(2) of the latter ensuring comprehensive mutual assistance between member states in respect of them.

[84] United Nations, *op. cit.*, paragraph 3.54.

[85] See note 59.

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person

as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud'.[86]

Liability is thus imposed on the basis of two criteria: the existence of a link between the offence and the legal person, since the former must have been committed for the latter's benefit, financial or other; and the existence of a link between the physical offender and the legal person, in this case a leading position ascertained through a series of formal and substantial criteria. The abstract reference to the exercise of control as a substantial criterion to ascertain a leading position has been interpreted to include 'responsibility for internal financial control and auditing or ...membership of a controlling or supervisory body internal to the legal person, to the extent that these positions correspond to a leading position which implies a possibility of influencing the legal person's management'.[87]

Paragraph 2 of the same article extends liability to cover cases where offences were committed by a person subordinate to the person in a leading position.

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[86] The imposition of liability to legal persons in respect of fraud reflects the proposals made in the Corpus Juris, a study prepared on the request of the European Parliament and under the aegis of the Commission, reflecting the views of researchers from the Association of European lawyers fort he protection of the Financial Interests of the Community. See M. Delmas-Marty (dir.)(1997), *Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union*, Economica, Paris. Article 14 establishes criminal liability of corporations and other organisations which are recognised by law as competent to hold property, for a series of offences including money laundering, 'provided the offence is committed for the benefit of the organisation, or any person acting in its name and having power, whether by law or merely in fact, to make decisions'. Article 7 on the other hand establishes the offence of money laundering as: a. the conversion or transfer of goods resulting from any of the criminal activities mentioned in articles 1 to 6 (fraud in the Community budget, market-rigging, corruption, abuse of office, misappropriation of funds, disclosure of secrets pertaining to one's office) or participation in such activity with the aim of concealing or disguising the illicit origins of such goods or of helping any person involved in this activity to escape the legal consequences of his acts; and b. the concealing or disguising of the nature, origin, site, placing, disposal, movements or the real ownership of goods or rights resulting form any criminal activity mentioned in the previous paragraph, or participation in such an activity'.

[87] Explanatory Report on the Second protocol to the Convention on the protection of the European Communities' financial interests, OJ C91, 31.3.1999, p.8, including an analysis of the liability criteria.

Liability is thus imposed on the legal person when fraud, corruption or money laundering have been possible due to lack of supervision and control. As stated in the Protocol's Explanatory Memorandum, this paragraph does not necessarily imply an objective responsibility on the part of the legal person, but may be interpreted in being limited to cases where the legal person as such may be blamed for culpable behaviour of persons acting on its behalf.[88] The imposition of liability to legal persons under paragraphs 1 and 2 do not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption and money laundering.[89]

In addition to the introduction of liability for legal persons, the Protocol innovates to a further extent with regard to the imposition of sanctions. According to article 4, sanctions for legal persons held liable pursuant to article 3(1) must be effective, proportionate and dissuasive, may include criminal and non-criminal fines, and may also include a series of alternative sanctions such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; and (d) a judicial winding-up order. Such alternative sanctions are not available in cases of an offence caused by a subordinate person due to the lack of supervision or control. In the latter case however, it has been ascertained that civil and administrative sanctions beyond the criminal law should, where appropriate, retain their punitive character in going beyond mere reparation of damages or restitution of wrongful enrichment.[90]

The imposition of liability to legal persons under the Second fraud protocol has been influential in that an equivalent, albeit not as detailed, provision has been included in the Joint Action on participation in a criminal organisation.[91] Article 3 establishes criminal or non-criminal liability for legal persons committing offences of participation in an organisation with a view of committing offences which

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[88] *Ibid.*
[89] Article 3(3).
[90] Explanatory Report, *op. cit.*

include, as seen above,[92] money laundering. In alignment with the fraud protocol, liability is established without prejudice to criminal liability of natural persons and is penalised in an effective, proportionate and dissuasive manner with the possibility of imposing material or economic sanctions.

Following the Recommendations of the Financial Action Task Force,[93] liability of legal persons for money laundering has thus been introduced in EU law. As such liability refers to the laundering of proceeds from restrictively enumerated predicates, the aforementioned concerns about lack of uniformity and legal certainty in their implementation remain acute. At the criminal law theory level, further concerns arise from the multiplication of criminal liability, its imposition to 'soulless' organisations with the potential to undermine the principle of moral culpability and blame,[94] and the broadening of the punishment of corporations in cases when employees commit offences in breach of their duties or company guidelines.[95] These concerns remain acute in view of the tendency to extend liability of legal persons, as reflected in establishment of corporate criminal liability *inter alia* for money laundering in the recent Council of Europe Criminal Law Convention on Corruption.[96]

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[91] See note 82.
[92] *Ibid*
[93] Recommendation 6 states that, where possible, corporations themselves, and not only their employees, should be subject to criminal liability.
[94] On a discussion of whether 'corporations are persons', see *inter alia* C. Wells (1993), *Corporations and Criminal Responsibility*, Clarendon Press, Oxford, chapter 5. Wells provides an excellent theoretical framework on the imposition of liability to corporations. See also Coffee (1981) ''No Soul to Damn, No Body to Kick' : an Unscandalised Inquiry into the problem of Corporate Punishment' in *Michigan Law Review*, vol.79, p.386. On a contrary view, asserting that both recklessness and intention, whch require a subjective evaluation, can be found in corporate policy, see C.M.V. Clarkson (1998), 'Corporate Culpability' in *Web Journal of Current Legal Issues*, vol.2.
[95] In the view of Lynch, 'not only does a corporation, as an artificial entity, lack any *mens* of its own, but the standard of vicarious liability for corporations has broadened in ways that make even a metaphorical corporate 'mens rea' elusive: when corporations are held liable for the acts of relatively low-level managers, even acting in violation of express corporate policy, it becomes difficult to sustain the idea that 'the corporation' as an entity is blameworthy in any way that is easily analogized to the intentional actions of a natural person'. G.E. Lynch (1997),'The Role of Criminal Law in Policing Corporate Misconduct' in *Law and Contemporary Problems,* vol.60, no.3, p.39.
[96] ETS No. 173, 27.1.1999. Article 18 of the Convention establishes corporate liability for the offences of active bribery, trading in influence and money laundering from these offences and passive bribery, as they are defined in articles 2-12 (the money laundering offence *per se* is

The multiplication of criminal liability in this context is an uncontested fact. Liability is imposed not only on legal persons, but also on the natural persons perpetrating the offences. In order to soothe the rest of the concerns however, the fraud protocol rightly limits punishment in cases where offences are committed from people in a leading position able to influence the management of the legal person, or where they are committed by lower level employees due to lack of supervision or control. At the same time, punishment extends at certain cases to alternative sanctions which take into account the special position of legal persons and the potential of dissuasive economic measures in this respect.[97] In cases of money laundering, this may, notwithstanding the silence of the directive, be a useful model for punishing both the money laundering offence and the breach of the duties incumbent on a series of organisations and professions.

9. CONCLUSION

The perception of money laundering as a security threat, closely associated with activities of organised crime groups, have led to the establishment of a new offence which was deemed to be essential to counter this threat. This process of 'securitisation' has led to transferring the vagueness and all-embracing character of threat discourse- assuming that organised crime and money laundering threaten everything from human life to the stability of the financial system and the very

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established in article 13). Furthermore, liability of legal persons in the context of environmental offences is established in the Council of Europe Convention on the Protection of the Environment through Criminal Law (ETS No.172, 4.11.1998), in article 9. Both Conventions translate in a legally binding form to a great extent the efforts made by the Council of Europe in the Recommendation No. R(88)18 on 'liability of enterprises for offences'. On the series of criminal alw isues related to liabiltiy of legal persons, see Council of Europe (1990), *Liability of Enterprises for Offences: Recommendation No. R(88)18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and explanatory memorandum*, Strasbourg.

[97] In this context, article 24 of the United Nations Model Law on Money Laundering, which establishes criminal liability for corporate entities, provides the following additional sanctions to fines or convictions: the permanent or temporary ban on the corporation involved from directly or indirectly carrying on certain business activities; the order of permanent or temporary closure of premises which were used for the commission of the offence; and the requirement from corporations to publicise the judgment in the press or by radio or television.

substance of the state[98]- to the justification of the offence in criminal law and the delimitation of the interests it is set out to protect.

In this process, such interests have been 'dynamitised':[99] rather than being produced through social processes, they have largely been imposed 'from above', through a securitisation discourse. This has led to the substitution of classical individual interests by emotionally charged and abstract 'collective interests': the soundness of the financial system, the effectiveness of criminal justice, the rule of law.[100] In this manner, the guaranteeing principles requiring a concrete and perceptible attack to a specifically defined interest in imposing a criminal offence are greatly undermined.[101]

The invocation of broadly defined collective interests in need of protection raises further issues with regard to the actual link of the criminalised conduct with the harm that is produced. Is the process of money laundering, which is perpetuated through a series of everyday, outwardly ordinary transactions, a threat to interests such as human life or societal or state security? In answering in a positive way, one may be tempted to use the theory of remote harm and classify money laundering as a type of conduct which 'might create an opportunity for serious harm to be caused subsequently'.[102] In this case however, even this is too tenuous a link: money laundering does not cause the commission of organised crime offences; it might, at a prior stage, encourage their commission but this is far from a causal link capable of justifying the, in any case controversial,[103] remote

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[98] See chapters 1 and 2.
[99] Term put forward by Baratta. See note 19.
[100] For an extensive analysis of such issues in the money laundering context, see J. Vogel (1997),'Geldwäsche-ein europaweit harmonisierter Straftatbestand?' in *Zeitschrift für Strafrechtliche Wissenschaft*, vol.107, no.2, pp.335-356. For a more general analysis, see P.-A. Albrecht (1997),'La Politique Criminelle dans l'État de Prevention' in *Déviance et Société*, vol.21, no.2, pp.123-136. See also chapter 1.
[101] In the context of organised crime legislation in Italy, see S. Moccia (1997), 'Aspects Régressifs du Système Pénal Italien' in *Déviance et Société,* vol.21, no.2, p.138.
[102] A. Ashworth (1999), *Principles of Criminal Law*, 3rd edition, Oxford University Press, Oxford and New York, p.52.
[103] The objections to the remote harm theory lie first of all in the assertion that there is no causal link between criminalised conduct and crime. Secondly, it is argued that conduct that is not harmful

harm argument. The only protracted interest that may be deemed as directly linked with money laundering is the integrity and normal function of the financial system. It should be reminded however that this interest is very vague and its protection under criminal law can be contested.[104]

The discourse of danger leads at the same time to an extensive broadening of punishability: since the offence is introduced in order to counter a clear and present danger against the collectivity, it must be extended to counter everything that may put the protected interest at risk. In the case of money laundering, a wide range of everyday conduct has been criminalised, resulting in an open-ended, vague *actus reus* for the money laundering offence. The situation is far from remedied in view of the patchwork implementation of the directive in the member states and the tendency to extend the catalogue of predicates to proceeds from the all-embracing category of 'all serious crime'.

Moreover, through the increasing recourse to liability on the basis of negligence and the interpretation of *mens rea* requirements through a recourse to the different logic of civil law, such conduct may be punished even in cases when the criteria of culpability are not fulfilled. Such extension has been proposed at EU level in the Action Plan to combat organised crime[105] and has been rightly rejected by the European Parliament[106] as it signifies a shift from the punishment of acts towards the punishment of behaviour,[107] resulting in the breach of fundamental criminalisation requirements of act and guilt. In the case of money laundering these

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in itself should not attract liability 'at least not unless it is accompanied by an intention to commit a substantive offence'. Ashworth, *op. cit.*

[104] In line with objections to the criminalisation of insider dealing, criminalising money laundering in order to protect financial markets can be criticised on two grounds: the establishment, in this manner, of a remote harm of accumulative nature, in need for the same conduct by a large number of persons for the harm to be possible; and the possibility to attain the objective through the adoption of non-criminal forms of regulation. Ashworth, *op. cit.*, pp.53-54, citing relevant literature on insider dealing.

[105] Recommendation 26(b) provides that the opportunity of extending money laundering to negligent behaviour should be examined.

[106] Resolution of the European Parliament on the action plan to combat organized crime (7421/97-C4-0199/97) in *Opinion of the European Parliament on the Action Plan to combat organized crime*, DOC. 5858/98, LIMITE, CRIMORG 17, Brussels, 18.2.1998.

concerns obtain further dimensions, in view of the fact that, through the criminalisation of negligence, there is a danger of punishing everyday ordinary behaviour in cases where there is no intention and no knowledge of money laundering: in view of the thin line between the legitimate and the illegitimate world, the observance of 'appropriate standards' appears too heavy a burden in these cases. This burden appears even heavier in view of the increasing tendency to reverse the burden of proof. The criminalisation of money laundering may thus lead to an omni-potent means of social control, through the extra-legal, ideological infiltration of criminal law by politically formed and imposed concepts of security which lead to an unlimited power of prosecution and punishment.

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Securitisation through responsibilisation: the imposition of duties on credit and financial institutions and other professions and persons

1. INTRODUCTION

The main body of the money laundering directive consists of provisions establishing a series of duties to be followed by credit and financial institutions. These duties, largely based on the FATF Recommendations, reflect the preventive aspect of the anti-money laundering strategy. At the same time, their adoption marked a swift departure from well-established legal principles of commercial regulation. In order to demarcate the changes brought about by the directive in this field, the first part of the analysis will focus on examining the relationship of credit institutions, the principal sector of the economy to be first placed under the obligations of the directive, with their customers prior to the adoption of money laundering counter-measures. The analysis of the directive's provisions will thus be viewed in the light of these changes and will be complemented by an overview of potential further changes in every day life, brought about by proposals to amend the directive in extending its scope *ratione personae*. The examination of the legal impact of these developments will then be accompanied by a broader theorisation of the duties imposed on individuals as a new model of governance and social control.

2. THE BANKER-CUSTOMER RELATIONSHIP PRIOR TO THE MONEY LAUNDERING DIRECTIVE: THE ROLE OF BANK CONFIDENTIALITY

I. THE BANKER-CUSTOMER RELATIONSHIP

In English law, the banker-customer relationship is based on contract.[1] While the limitation of the relationship to the maintenance of an account brought forward the conceptualisation of the contract as one of borrower and creditor, the multitude of services offered by banks beyond simple account maintenance have led to the abandonment of this view, in favour of the perception of the contract as a *sui generis* one 'incorporating elements of specific, well-defined contracts, such as that of debtor and creditor'.[2]

The doctrinal reference to a *sui generis* contract reflects the distinctive element of proximity in the banker-customer relationship. Such proximity gives rise to the establishment of a fiduciary relationship between the parties. According to a leading case, such a relationship exists 'where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded.'[3] This is indeed the case between the banker and her customer, especially in view of the expertise and range of services offered by the former.

Similar issues reflecting the complexity of the banker-customer relationships are also reflected in civil law jurisdictions. An eloquent illustration can be encountered in the German banking law doctrine. There, the foundation of the relationship on a 'general banking contract'[4] departing from traditional contractual principles

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[1] See *inter alia* E. P. Ellinger and E. Lomnicka (1994), *Modern Banking Law*, 2nd ed., Clarendon Press, Oxford p. 107.
[2] Ellinger and Lomnicka, *op. cit.*, p.110.
[3] *Lloyd's Bank Ltd. V. Bundy* (1975) QB 326, cited in Ellinger and Lomnicka, *op. cit.*, pp.116-117.
[4] On the general banking contract (*'algemeinesbankvertrag'*), see Canaris (1988), *Bankvertragsrecht*, Munich, Anm. 2-3

competes with the 'transaction bond approach'. The latter focuses on the transaction bond between banker and customer which creates, on the basis of good faith as enshrined in law, an 'obligation without supply', and a relationship of trust giving rise to obligations of protection of the customer's interests, which exist irrespective of any contract and before their foundation.[5] Going beyond the restrictions inherent in the contractual approach, this theory takes into consideration extra-contractual aspects of good faith and trust in establishing the banker's 'trust liability founded on the transaction bond'.[6]

II. THE BANKER'S DUTY OF CONFIDENTIALITY: THE FOUNDATION

The prevalent element of trust in the banker-customer relationship, which is acknowledged in one form or the other in both common and civil law jurisdictions, is inextricably linked with the duty of confidentiality owed by the former. In the aforementioned Lloyd's case, it was held that the features of the fiduciary relationship include 'a vital element...referred to as confidentiality'.[7] In a similar vein, it is also accepted in English doctrine that the duty emanates from the elements of agency existing in the banker-customer contract, as an agent owes duties of loyalty and confidentiality to her principal .[8] According to Ellinger and Lomnicka, the agent's duty of confidentiality is based on both economic and historical considerations: the economic aspect lies in the need to rely on the discretion of the person who is called upon to undertake confidential work; historically, on the other hand, the agent has been regarded as in a position of trust, safeguarding the principal's interests and confidences.[9] In the case of *Parry Jones v. Law Society*,[10] it was noted by Diplock LJ that a duty of confidentiality exists in various categories of agency relationships such as solicitor and client, banker and customer, doctor and patient and accountant and client.

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[5] Canaris, *op. cit.*, p.10
[6] Canaris, *op. cit.*, p.8.
[7] See note 3.
[8] Ellinger and Lomnicka, *op. cit.*, p.134.
[9] Ellinger and Lomnicka, *op. cit.*
[10] (1969) 1 Ch. 1, 9.

In a similar vein, the prevalent view in German doctrine bases the duty of confidentiality on the relationship of mutual trust between the parties.[11] The contractual approach views secrecy as a secondary duty resulting from the bank contract. In line with the transaction bond theory, it is argued on the other hand that when no contract exists, the duty stems from a special trust relationship established at the inception of the business relationship.[12]

The view basing confidentiality on trust stands in the middle ground between two diametrically divergent approaches to the issue. According to the first, which constitutes rather a minority view in Germany and is also encountered in other civil law jurisdictions, confidentiality is viewed as a customary right stemming from commercial usage,[13] reflecting the absence of a specific statutory recognition of the principle in some jurisdictions.

On the other hand, bank confidentiality is deemed to emanate from the constitutionally enshrined principle of protection of personhood, which includes both freedom of personal development and economic freedom,[14] the former encompassing the right to privacy. The protection of confidentiality through personality rights has led to arguments in favour of the assertion of a similar protection under the personality provisions of civil law,[15] while also included in the scope of the wider principle of professional secrecy protected by criminal law.[16]

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[11] H. Jung (1992), 'Germany' in D. Campbell (ed.), *International Bank Secrecy*, Sweet and Maxwell, London, p.214. See also O. Sandrock and E. Klausing (1993), 'Germany', in R. Cranston (ed.), *European Banking Law: The Banker-Customer Relationship*, Lloyd's of London Press Ltd., London, New York, Hamburg, Hong Kong, pp. 92-93.

[12] *Ibid.*

[13] Jung, *op. cit.*, p.213. See also 'Italy', by C. Vento and R. Betti Berutto in Campbell, *op. cit.*, pp.387-388. In Italy, however, the theory of commercial usage is concurrent with a theory linking the protection of banking secrecy to the principle of fairness provided in the Civil Code. See S. Cotterli, 'Italy', in Cranston, *op. cit.*, pp.113-114.

[14] Canaris, *op. cit.*, pp.25 *et seq.*; Jung, *op. cit.*, pp.213-214.

[15] Canaris, *op. cit.*, p.29, who refers to a 'subjective right of personal/home sphere'.

III. THE DUTY OF CONFIDENTIALITY: THE LIMITS

In English law, the banker's duty of confidentiality was specifically established and delineated in 1924, in the leading *Tournier* case,[17] where it was held that the duty of confidentiality is symbiotical with the banker-customer relationship, stemming from contract. At the same time, it was asserted that this legal duty was not absolute, but subject to a series of qualifications. According to Bankes LJ, such qualifications can be classified under four heads: a. where disclosure is under compulsion by law; b. where there is a duty to the public to disclose; c. where the interests of the bank require disclosure; and d. where the disclosure is made with the express or implied consent of the customer.[18]

The exceptions to the banker's duty of confidentiality can thus be grouped into two broad categories: those centered on the interests of the parties in the banker-customer relationship; and those going beyond this relationship, in order to address broader public interest considerations. The latter present a great challenge to the predominantly private relationship between banker and customer, which is based on the parties' contractual and wider economic freedom. They can also be viewed to threaten the corollary of such freedom, i. e. the right to privacy. This led the authors of the Jack Report on Banking Services[19] to react to what was deemed a 'torrent of new legislation', which was viewed as unclear and ultimately 'a serious inroad into the whole principle of customer confidentiality'.[20]

As noted by the Jack Report, the major application of the 'compulsion of law' qualification is achieved though compulsion by statute. The Report refers to nineteen such statutes. Most of them deal with financial regulation, centered on

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[16] On the protection of bank confidentiality by criminal law, see S. N. Deverakis, 'Greece' in Campbell, *op. cit.*, pp.273-274.
[17] *Tournier v. National Provincial Bank of England* (1924) 1 KB 461.
[18] For an extensive analysis of the scope and interpretation of these qualifications, see Ellinger and Lomnicka, *op. cit.*
[19] *Banking Services: Law and Practice Report by the Review Committee*, chairman: Professor RB Jack CBE, (1989) Cm 622.
[20] Jack Report, *op. cit.*, p.31 (paragraphs 5.07 and 5.08).

investigations by supervisory authorities, where bankers may be required to answer questions or produce documents. On the other hand, criminal law statutes such as the Police and Criminal Evidence Act 1984, allow access to documents for the purposes of a criminal investigation. The compatibility of the latter with bank confidentiality was examined in the *Barclays* case[21] , where it was held that there is no implied term in the banker-customer contract obliging the bank to inform the customer of any application of section 9 of the Act in furtherance of its duty of confidentiality. The Court rejected the claim by asserting the public interest in assisting the police in the investigation of crime.

The criminal law exception, along with exceptions in financial regulation measures are also encountered in civil law jurisdictions. Most of the criminal law exceptions are encountered in Codes of Criminal Procedure, requiring bankers to testify and permitting access to the bank's documents.[22] However, as in most of the cases in English law,[23] the exceptions to the duty of confidentiality are specifically enumerated, restrictively interpreted and require a reactive duty from the bank to provide assistance *when called upon by the authorities to do so.*

IV. PROFESSIONAL CONFIDENTIALITY IN BANK SUPERVISION: THE EC FRAMEWORK

The restrictive and 'reactive' interpretation of exceptions to bank confidentiality is also reflected in the field of disclosure in banking supervision. While the impact of such rules to the banker-customer relationship is not of central importance, as interference with the customer's records will happen only in cases where customer's information is disclosed together with information relating to the bank,[24] the development of European Community law through the case-law of the

[21] *Barclays Bank PLC v. Taylor, Trustee Savings Bank of Wales and Border Counties and Another v. Taylor and Another* (1989) 3 All E.R. 563.
[22] For an overview, see Campbell, *op. cit.*
[23] With the exception of the Drug Trafficking Offences Act and the Prevention of Terrorism Act.
[24] F. Randolph, 'European Community', in Campbell, *op. cit.*, p.740.

European Court of Justice provides important conceptual insights regarding the recognition and protection of confidentiality in the banking sector.

The Court has ruled on the scope of article 12 of the First Banking Directive[25], whose first paragraph imposed on all persons employed by banking supervisory and authorisation authorities an obligation of professional secrecy providing that 'any confidential information which they may receive in the course of their duties may not be divulged to any person or authority except by virtue of provisions laid down by law'.

According to the European Court of Justice, this provision includes 'general provisions not specifically intended to lay down exceptions to the ban on disclosing the kind of information covered by the directive, but establishing the limits which the maintenance of professional secrecy places on the obligation to give evidence as a witness'.[26] The Court however avoided establishing an unequivocal limitation to the provision, in a judgment reflecting the considerable differences between member states in the field of professional secrecy.[27]

Article 12 has been subsequently amended by article 16 of the Second Banking Directive.[28] This provision limits the exception to confidentiality. Paragraph 1 provides that no confidential information that the competent authorities may receive in the course of their duties 'may be divulged to any person or authority whatsoever, except in summary or collective form, such that individual institutions cannot be identified, without prejudice to cases covered by criminal law'. The only instance when information may be divulged in civil or commercial proceedings is,

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[25] Directive 77/780/EEC of 12.12.1977 'on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions', OJ L322, 17.12.1977, p.30.
[26] Case 110/84, *Municipality of Hillegom v. Hillenius*, [1989] ECR 39, paragraph 34.
[27] M. Dassesse, S. Isaacs and G. Penn (1994), *EC Banking Law*, 2nd edition, Lloyd's of London Press ltd., London, New York, Hamburg, Hong Kong, paragraph 17.3, pp.211-212
[28] Directive 89/646/EEC of 15.12.1989 (OJ 1989, L 386, 30.12.1989, p.1) 'on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending directive 77/780/EEC as corrected'.

following the judgment of the European Court of Justice,[29] when a credit institution has been declared bankrupt or is being compulsorily wound up and the information does not concern third parties involved in attempts to rescue that credit institution.

In contrast, the obligation of professional secrecy is considerably relaxed in new article 12(5), which authorises the exchange of information within one member state or with another member state between the competent authorities and the following institutions: the authorities responsible for the supervision of other financial institutions, insurance companies, and financial markets, bodies involved in the liquidation and bankruptcy of credit institutions, persons responsible for carrying out statutory audits of the accounts of credit institutions and other financial institutions, in the discharge of their supervisory functions and bodies which administer deposit-guarantee schemes to the extent necessary for the exercise of their functions.[30] According to article 12(7) on the other hand, member states may authorise the disclosure of certain information to other departments of their central government administrations responsible for legislation on the supervision of credit institutions, financial institutions, investment services and insurance companies and to inspectors acting on their behalf. Such disclosure is made only where it is necessary for prudential control reasons.

This list has been extended by subsequent legislative action: directive 95/26 added to it the following institutions:
-. the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of financial undertakings and other similar procedures, or the authorities responsible for overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions

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[29] J.A. Usher (1994), *The Law of Money and Financial Services in the European Community*, Clarendon Press, Oxford, p.110.
[30] According to article 12(2) however, information exchanged once is subject to the obligation of secrecy.

-. the authorities or bodies responsible under the law for the detection and investigation of breaches of company law

-. central banks and other bodies with a similar function in their capacity as monetary authorities and, where appropriate, other public authorities responsible for overseeing payment systems, when the information is intended for the performance of their tasks

-. clearing houses or other similar bodies recognised under national law for the provision of clearing or settlement services for one of the member states' markets.[3132]

Directive 98/33 on the other hand amended article 12(3) to enable member states to conclude co-operation agreements providing for the exchange of information 'even with non-banking supervisory authorities of third countries'[33] subject to guarantees of professional secrecy which are at least equivalent to those applied in the Community.[34]

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[31] European Parliament and Council Directive 95/26/EC of 29.6.1995 amending Directives 77/80/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision, OJ L168, 18.7.1995, p.7. New articles 12(5a), 12(5b), 12(6) and 12(8) respectively, inserted by article 3. While in the first two cases reference is made to information exchange, 12(6) and (8) refer respectively to the more one-sided terms of 'transmission' and 'communication' of information by the competent authorities to the institutions involved.

[32] Article 5 of Directive 95/26/EC on the other hand inserts new article 12a which imposes a series of disclosure obligations. Company auditors, as defined in Directive 84/253/EEC (OJ L126, 12.5.1984, p.20), who perform defined auditing functions or any other statutory task, have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which they have become aware while carrying out a task which is liable to: constitute a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of financial undertakings; affect the continuous functioning of the financial undertaking; or lead to refusal to certify the accounts or to the expression of reservations.

[33] J.A. Usher (2000), *The Law of Money and Financial Services in the European Community*, 2nd edition, Clarendon Press, Oxford, forthcoming, p.139 (in draft).

[34] Directive 98/33/EC of the European Parliament and of the Council of 22.6.1998 amending Article 12 of Council Directive 77/80/EEC on the taking up and pursuit of the business of credit institutions, Articles 2,5,6,7,8 of and Annexes II and III to Council Directive 89/647/EEC on a solvency ration for credit institutions and Article 2 of and Annex II to Council Directive 93/66/EEC on the capital adequacy of investment firms and credit institutions, OJ L204, 21.7.1998, p.29, article 1.

Both directives 95/26 and 98/33 were adopted after the money laundering directive, reflecting calls for the intensification of prudential supervision. They resulted in a long list of derogations to the obligation professional secrecy. These derogations are particularly extensive when information is transmitted to other competent authorities, but still strictly limited when information is transmitted to judicial authorities. Prior to the money laundering directive, exceptions to the obligation of professional secrecy in the field of banking supervision were thus limited and clearly delineated.

3. THE DUTIES OF CREDIT AND FINANCIAL INSTITUTIONS UNDER THE MONEY LAUNDERING DIRECTIVE

I. JUSTIFICATION

The money laundering directive introduced a series of extensive obligations for credit and financial institutions. In terms of the banker-customer relationship, the changes brought about by these provisions were so radical, that they were characterised as the 'death of bank secrecy'.[35] Prior to examining in detail the scope and content of these duties, it is essential to begin with an overview of their justification in the discourse of the Community institutions.

The Commission, in its explanatory memorandum on the initial directive proposal, called for preventive action in combating money laundering. It was assessed that credit institutions are frequently used to carry out money laundering activities and in this manner their soundness and stability as well as the prestige of the financial system as a whole is jeopardised.[36] The securitisation elements of this approach, centering on money laundering as a threat to financial stability, was followed by the appeal of the Economic and Social Committee for participation in the fight against drug trafficking. In its Opinion on the Commission's draft,

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[35] M. Levi (1991), 'Regulating Money Laundering: The Death of Bank Secrecy in the UK', in *British Journal of Criminology*, vol.31, no.2, pp.109-125.
[36] OJ C106, 28.4.1990, p.6.

reference is made to the moral obligation everyone has to 'join in the fight against a scourge which undermines human dignity and the physical and moral integrity of its victims, many of whom are young people'.[37]

Along with presenting the fight against money laundering as essential to counter a multifaceted threat, this kind of discourse creates a potent imagery of the community united against danger. The participation in the fight against crime is put forward as a moral imperative that everybody has to follow. The attention is shifted specifically to credit institutions, which, according to the Committee, 'cannot remain insensitive to the risk of the whole financial system being destabilized or of the loss of public confidence which could result if financial channels were used for laundering money gained from serious crimes condemned by the international community'.[38]

Not only is it thus immoral to launder money, but it is equally immoral not to participate in efforts at countering the threat. In this moralisation crusade, the targeting of banks is notable: according to the Commission's explanatory memorandum, the Community cannot 'remain indifferent to the involvement of credit and financial institutions in money laundering'.[39] The 'innocence' of the latter is thus far from presumed: according to the Commission, 'in a similar way to that in which the Community directives in the financial sector try to guarantee that persons who effectively direct the business of credit institutions have 'good repute', as well as that the shareholders are 'suitable', Community legislation must ensure the integrity and 'cleanliness' of the financial system'.[40]

The quest for 'cleanliness' is in this manner sharply contrasted with the world of 'dirty' money and the potential involvement of banks in it. In order to remedy this situation, credit and financial institutions are called to actively join in the fight against money laundering. This is reflected in the preamble of the finally adopted

[37] OJ C332, 31.12.1990,p.86, at point 1.2.
[38] *Ibid.*
[39] See note 28.

directive, which acknowledges that such institutions have to play 'a highly effective role in combating money laundering'[41], as the latter constitutes 'a particular threat to Member States societies'.[42] The preamble further reiterates the assertion that the use of credit and financial institutions in laundering money jeopardises not only their soundness and stability, but also confidence in the financial system as a whole, 'thereby losing the trust of the public'.[43] It is an irony to note that the notion of trust upon which the banker-customer relationship is based is here used for its erosion.

II. THE CONTENT

A. The 'know your customer' principle: identification and record keeping duties

Article 3(1) of the directive establishes the duty of credit and financial institutions to require identification of their customers when entering into business relations. Article 4 further imposes the duty to keep a series of documents for use as evidence in any investigation into money laundering. Such requirements reflect the 'know your customer' principle, which constitutes one of the leading strategies in money laundering prevention. The rationale for this strategy has been eloquently explained in the UK money laundering Guidance Notes for the financial sector as follows:

> 'The need for banks and building societies to 'know your customer' is vital for the prevention of money laundering and underpins all other activities. If a customer has established an account under a false identity, s/he may be doing so for the purpose of defrauding the bank or building society itself or merely to ensure that s/he cannot be traced or linked to the proceeds of crime that the institution is being used to launder. A false

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[40] *Ibid.*
[41] OJ L166, 28.6.1991, p.77. Preamble, fifth recital
[42] Preamble, third recital
[43] Preamble, first recital

name, address or date of birth will usually mean that the law enforcement agencies cannot trace the customer if s/he is needed for interview in connection with an investigation'.[44]

The directive does not contain any provisions on identification procedures and methods. This has led to a series of issues in its implementation, notably with regard to the different general identification systems in the member states. In Germany, the 1993 Act on the Detection of Proceeds from Serious Crimes, equates identification with 'the establishment of a person's name by means of an identity card or passport as well as the date of birth and the address to the extent that they are contained therein, and the determination of the type, number and issuing authority of the official identity document'.[45]

As is noted by Gilmore, the situation becomes less straightforward in countries such as the United Kingdom, where there is no official identity card.[46] This leads to a considerable degree of flexibility and vagueness with regard to identification requirements. The money laundering Regulations of 1993 require in general 'satisfactory evidence of identity'.[47] This requirement is met if the evidence is 'reasonably capable of establishing that the applicant is the person he claims to be'; and if the person obtaining the evidence is satisfied that the evidence does establish that fact.[48] The vagueness of this provision and its considerable invasiveness regarding the prospective customer's private sphere is hardly remedied by the money laundering Guidance Notes, which provide that ideal face-to-face identification requires an official document accompanied by a photograph, and that the information provided by the customer must be verified to prove the correctness of the facts.[49]

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[44] Joint Money Laundering Steering Group, *Money Laundering: Guidance Notes for the Financial Sector*, revised and consolidated June 1997, point 4.01.
[45] Section 1(5), cited in W.C. Gilmore (1999), *Dirty Money: The Evolution of Money Laundering Counter-Measures*, 2nd edition, Council of Europe Press, p.161. See also G. Werner (1996), *Bekämpfung der Geldwäsche in der Kreditwirtschaft*, Iuscrim, Freiburg im Breisgau, pp.117 *et seq.*
[46] Gilmore, *op. cit.*, p.162.
[47] Regulation 7(1).
[48] Regulation 11(1). Along with Regulation 7(1), cited in Gilmore, *op. cit.*, pp.165-166.
[49] Joint Money Laundering Steering Group, *op. cit.*, point 4.05.

The identification requirements may also clash with long-standing traditions in member states. This is most clearly illustrated in the case of Austria, where the possibility of opening anonymous passbooks by Austrian residents still exists. This has led to the issue of a warning by the Financial Action Task Force[50] and the initiation by the Commission of proceedings in the European Court of Justice for incorrect implementation of the directive by Austria.[51] In view of such pressure, which was intensified by the prospective suspension of Austria as a FATF member,[52] the Austrian Government recently announced that it will be taking measures to abolish anonymous accounts.[53] Developments in the field, in view of the scheduled hearing of the case in the Court for 15 May 2000, are eagerly awaited.

Further issues arise from the directive's requirement for identification of beneficial ownership. Article 3(5) provides that in the event of doubt as to whether the customers are acting on their own behalf, or in cases when it is certain that they are not acting on their own behalf, credit and financial institutions shall take reasonable measures to obtain information as to the real identity of the persons on whose behalf those customers are acting. The use of the 'reasonable measures' terminology has been criticised for its vagueness and openness to a wide range of differing interpretations.[54] An illustration of the issue is provided by the UK money laundering Regulation 9(3), which defines as a reasonable measure 'best practice which, for the time being, is followed in the relevant field of business and

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[50] Financial Action Task Force, Warning about Austrian Anonymous Savings Passbooks, Paris, 11.2.1999. It is stated in the warning that 28 million such accounts exist in Austria, where at present any resident can hold an anonymous 'passbook' savings account.

[51] 'Commission takes Austria to Court over money laundering' in *European Report*, No.2260, 18 October 1997.

[52] OECD News Release, 'Austria suspended as a member of the Financial Action Task Force on Money Laundering in June 2000 unless action taken on anonymous passbooks', Paris, 3.2.2000.

[53] Bulletin Quotidien Europe, 'Austria to abolish anonymous savings accounts', No 7662, 24.2.2000, p.14.

[54] R. Bosworth-Davies and G. Saltmarsh (1994), *Money Laundering: A Practical Guide to the New Legislation*,Chapman & Hall, London, Glasgow, Weinheim, New York, Tokyo, Melbourne, Madras, p.181.

which is applicable to those circumstances', and adds thus to the inherent vagueness of the directive provision.[55]

The identification of beneficial ownership becomes a difficult task in cases where the intermediary person is in a special relationship of trust with the owner. This is due to the enhanced legal obligation of secrecy in most of these relationships. The special nature of trust relationships has been acknowledged by the FATF evaluation of customer identification measures, where it was further ascertained that in almost all members, it is not mandatory to identify the name of each beneficiary of a trust.[56] The Report further raised the issue of the difficulty of identifying the parties for whom the trustee or nominee is acting and 'to seek confirmation that the source of funds or assets under the trustee's control can be vouched for'.[57]

Further issues are raised in the case of beneficial ownership identification in solicitor-client relationships. The difficult position of credit and financial institutions when faced with conflicting principles of legal confidentiality has been highlighted by the British Bankers' Association in their memorandum to the House of Lords, an extract of which is worth quoting at length:

'Further thought needs to be given to the requirement that credit and financial institutions should take reasonable measures to establish the real identity of persons on whose behalf a transaction is carried out. On the face of it this imposes an obligation on a bank to enquire of a solicitor customer about the beneficial ownership of the proceeds of payments into or out of its client account, thus producing a conflict with the doctrine of legal confidentiality. Such irreconcilable conflict arises from the incorrect formulation of the thrust of the Directive, as it effectively singles out, and places the burden on, financial and credit institutions to act as policemen in respect of the activities of

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[55] *Ibid.*
[56] Financial Action Task Force, *Evaluation of Measures Taken by FATF Members Dealing with Customer Identification*, paragraph 61, downloaded by www.oecd.org/fatf/ and also found in FATF Annual report 1996-1997.
[57] *Ibid.*

intermediaries. The correct approach, it is submitted, should be to place that burden on the intermediary responsible for the transaction in the first place'.[58]

The directive does not contain any provision on customer identification in non face- to-face transactions. As the latter form an increasingly common practice,[59] this lack of regulation has the potential to create a major loophole in the system, especially in view of the difficulties in the establishment of true identity inherent in such transactions. The recent Commission proposal amending the money laundering directive addresses the issue by including an annex of principles for customer identification in non face-to-face transactions.[60]

The identification procedures under these principles aim at ensuring 'appropriate identification' of the customer[61] and require: official identification documents and address verification; the carrying out of the first payment of the operation through an account opened in the EU, the EEA and, if the member states allow, in reputable credit institutions established in third countries applying equivalent anti money laundering standards; and verification of whether the identities of the holder of the
account through which the payment is made and of the customer are one and the same.[62]

It is thus evident that the wording is considerably more detailed than the standard identification requirement of the directive. Problems however continue to exist: the implementation of the 'official identification' requirement is still problematic in countries with no formal compulsory identification documents,

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[58] British Bankers' Association Memorandum to HM Treasury in House of Lords Select Committee on the European Communities, *Money Laundering*, Session 1990-91, 1st Report (HL Paper 6).
[59] The FATF customer identification evaluation refers to direct banking, direct issue of credit cards, direct insurance writing and nominee securities accounts as prime examples of non-face to face transactions. See note 43, paragraphs 64-77.
[60] Commission of the European Communities, *Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering*, COM (1999)352 final, Brussels, 14.7.1999.
[61] Principle (I).
[62] Principle (v)(b). This principle applies in cases of non face-to-face transactions with the customer and not with another institution acting on her behalf.

while address verification, by sending documents concerning the operation by registered mail with advice of receipt of the customer's address, adds to the policing logic of the identification measures, widens the net of surveillance and raises issues of protection of the private sphere.

A corollary of the identification duty is the obligation of credit and financial institutions to keep records of their customers, as it is essential that the information that the former obtain through the identification procedures and their transactions with the customers can be used as evidence in money laundering investigations. As is noted in the UK money laundering Guidance Notes, 'often the only valid role a financial institution can play in a money laundering investigation is through the provision of relevant records, particularly where the money launderer has used a complex web of transactions specifically for the purpose of confusing the money trail'.[63]

The directive is thus opening the door for a wide range of documents to be used in money laundering investigations. It is unclear whether such records can be used in the pre-trial stage, or only in court proceedings. While the reference to their use as evidence in 'any investigation into money laundering' may lead to an extensive interpretation, it is submitted that the second indent of the article, calling for transaction records consisting of the original documents or 'copies admissible in court proceedings', may restrict use only to pre-trial investigations.

It is interesting to note that, according to the UK money laundering Guidance Notes, records kept under article 4 of the directive should be such that: a. requirements of the legislation are fully met; b. competent third parties will be able to assess the institution's observance of money laundering policies and procedures; c. any transactions effected via the institution can be reconstructed; and d. the institution can satisfy within a reasonable time any enquiries or court orders from

[63] Joint Money Laundering Steering Group, *op. cit.*, point 5.01.

the appropriate authorities as to disclosure of information'.[64] In addition to its evidentiary use, record keeping thus also serves as a means to evaluate the performance of the institution itself in the fight against money laundering.

B. The duties of co-operation: suspicious transaction reporting and associated obligations

i. Suspicious transaction reporting

a. General

The cornerstone of the directive's preventive framework is the imposition on credit and financial institutions of a broad duty of co-operation with the authorities responsible for combating money laundering. Article 6 defines the duty in a two-fold manner, placing the institutions concerned, their directors and employees, under the obligation to: inform the competent authorities, *on their own initiative*, of any fact which might be an indication of money laundering; and furnish those authorities, *at their request*, with all necessary information. [65]

The duty of credit and financial institutions to furnish the authorities, upon their request, with information, appears to be another exception to the banker's duty of confidentiality, similar to *reactive* communication duties in cases where the banker is called to testify or provide documentation in criminal proceedings. The directive however goes a significant step further, by imposing at the same time an unprecedented *proactive* duty on the institutions concerned to report, on their own initiative, money laundering indications to the authorities.[66]

In this manner, the directive has largely adopted what has been called the 'subjective' model for fighting money laundering, where transactions are reported

[64] *Ibid.*, point 5.02.
[65] Article 6(1). Emphasis added.
[66] On the proactive/reactive distinction, see Levi, *op. cit.*

on the basis of a subjective evaluation on behalf of the institution concerned, taking into account the customer's general transaction profile. This system is contrasted with the 'objective' model, which requires the institutions concerned to report all transactions exceeding a certain threshold.[67]

The directive is however laconic as to the exact formulation of the reporting duty, leaving member states with a considerable margin of discretion. This has led to two major methods of implementation: cases where the institutions concerned are placed under the obligation to report suspicious transactions to the authorities, a system that has been followed, albeit with slight differences,[68] in the majority of the member states; and cases where they are under the duty to report not suspicious, but unusual transactions, which was first formulated in the Netherlands.

b. Suspicious transaction reporting: the case of the United Kingdom

In one of the most draconian implementations of the directive, the laws of England and Wales establish as an offence the failure to disclose knowledge or suspicion of money laundering from drug trafficking and terrorism.[69] The provision is extended beyond the scope of the directive in covering any person in the course of their trade, profession, business or employment.[70] In view of the vagueness of the concept of suspicion, especially in criminal law, the final version of the section does not include the initially proposed test of 'knowing, suspecting or having reasonable grounds to suspect',[71] as the latter is too abstract a criterion to satisfy

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[67] For a detailed analysis and evaluation of the models, see R.K. Noble and C.E. Golumbic (1997-1998), 'A New Anti-Crime Framework for The World: Merging The Objective and Subjective Models for Fighting Money Laundering' in *New York Journal of International Law and Politics*, vol.30, pp.79-144.

[68] For an overview of differences in national suspicion reporting systems, notably with regard to what constitutes suspicion, see J. Riffault (1999), 'Le Blanchiment des Capitaux Illicites: Le Blanchiment des Capitaux en Droit Comparé', in *Revue de Science Criminelle*, pp.238-239.

[69] See chapter 4.

[70] Home Office, Organised and International Crime Directorate, Working Group on Confiscation, *Third Report: Criminal Assets*, November 1998, p.20, paragraph 3.2.

[71] British Bankers' Association, *op. cit.*, p.25. The Association was fiercely opposed to the inclusion of this clause.

legal certainty requirements. Reporting is based predominantly on the concept of suspicion, which, according to the UK money laundering Guidance Notes is 'personal and subjective and falls short of proof based on firm evidence'.[72]

The Guidance Notes attempt to limit this lack of objectivity by providing that suspicion is still 'more than the absence of certainty that someone is innocent'.[73] They further provide an attempt at definition, by stating that where there is a business relationship, a suspicious transaction is often one which is *'inconsistent with a customer's known, legitimate business or personal activities or with the normal business for that type of account'*. [74] As is noted further, it thus appears that the primary key to ascertain whether a transaction is suspicious is to know enough about the customer and her business. To this end, credit and financial institutions are called upon to consider the transaction in relation to the normal activities of the customer and examine whether the former is consistent and rational or whether the general pattern of transactions has changed.[75]

It is evident that, in ascertaining whether a transaction is suspicious or not, the personnel of credit and financial institutions act in a quasi-policing manner, examining in great detail the customer's otherwise private affairs. This assertion has been validated by empirical research conducted as early as 1994. As Gold and Levi have noted, money laundering suspicions follow 'the normal pro-active policing mode: conduct that is, or seems to be, 'out of place' and/or meets the criteria for 'methodic suspicion' for which the banker has been taught to look...is picked up and reported upwards as suspected proceeds of crime'.[76]

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[72] Joint Money Laundering Steering Group, *op. cit.*, paragraph 6.01.
[73] *Ibid.*
[74] *Ibid,* point 6.02. Emphasis added.
[75] *Ibid,* paragraph 6.03.
[76] M. Gold and M. Levi (1994), *Money Laundering in the UK: An Appraisal of Suspicion-Based Reporting*, The Police Foundation/University of Wales, pp.88-89. On a more concise overview of this project and a critique of the suspicious transaction reporting system, see M.Levi (1995), 'Incriminating Disclosures: An Evaluation of Money Laundering Regulation in England and Wales' in *European Journal of Crime, Criminal Law and Criminal Justice*, vol.2, pp.202-217. See also in

It is interesting to note here that, as is noted in the Guidance Notes, there is no duty on the institutions concerned to examine the criminal law of any other country where the offence may have occurred. Similarly, they are expected to know neither the exact nature of the criminal activity, nor that the funds are definitely those arising from an offence.[77] This is seemingly at odds with the Interpol definition of a suspicious transaction, as conduct which has reached 'a level of suspicion sufficient to identify a criminal offence'.[78] It also facilitates an increased flow of information to be disclosed to the competent authorities.

The use of the term 'suspicious' has been criticised by some commentators who advocate the term 'suspected'[79] transactions instead. The basis of this argument lies in the fact that, while 'suspicious' transactions refer to objective characteristics of the transactions themselves, which may never be revealed or may be proven to be mistaken, the term 'suspected' transactions focuses rather on 'a state of mind evaluating what we see'.[80] This view is useful in highlighting the subjectivity in the reporting mechanisms, while at the same time emphasising that the term 'suspicious' pre-supposes to a great extent that a conduct is worthy of trial investigation. At the more practical level, a division is put forward of disclosures being 'highly likely' and 'moderately likely' to be related to money laundering. Such division would approximate to the one made in the Dutch system between unusual and suspicious transactions, largely based on the level of certainty of the institution concerned.[81]

c. Unusual transaction reporting: the case of the Netherlands

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French: M.Levi (1995), 'Reglémentation sur le Blanchiment de l'Argent au Royaume-Uni: Une Évaluation' in *Déviance et Société*, vol.19, no.4, pp.379-385.

[77] Joint Money Laundering Steering Group, *op. cit.*, paragraph 2.04.

[78] Cited in Gold and Levi, *op. cit.*, p.89.

[79] *Ibid.*

[80] M. Levi (1997), 'Money Laundering and Regulatory Policies' in E.U. Savona, *Responding to Money Laundering. International Perspectives*, Harwood Academic Publishers, Australia, Canada, China, France, Germany, India, Japan, Luxembourg, Malaysia, the Netherlands, Russia, Singapore, Switzerland, Thailand, United Kingdom, p.274.

[81] Gold and Levi, *op. cit.*, p.106.

The inherent difficulties for credit and financial institutions to link a transaction with the commission of a criminal offence and to ascertain an 'objective' suspicion, have been addressed in the Netherlands by the establishment of a system of unusual transaction reporting. This is done by section 9 of the 1993 Disclosure of Unusual Transactions Financial Services Act, which extends the obligation also to intended transactions. The following passage justifies in the most eloquent manner this choice:

'As it is impossible for the staff of financial institutions to guess the kind of crime from which a customer's money may have been derived, disclosure in the Netherlands is not linked to particular crimes. In fact, the staff of financial institutions cannot usually say with any degree of certainty whether the money they are being offered was acquired legally or illegally. What they can assess, however, is whether or not a particular transaction, given its nature and the customer and amount involved, is normal. In other words, if it is a regular or an irregular transaction'.[82]

At first sight, the situation appears to be quite similar to that in the United Kingdom. The Dutch legislation is however different in requiring the disclosure of unusual transactions on the basis of a list of indicators, which are established, on the basis of the Disclosures Act, by the Ministries of Justice and Finance on a regular basis.[83] According to the Explanatory Memorandum of the Act, the aim of the system of indicators is 'to create criteria for identifying an 'unusual' transaction which are as objective as possible'.[84]

The Explanatory Memorandum goes on to distinguish between two categories of transactions: manifestly unusual and other unusual transactions.[85] This leads to the further distinction between objective and subjective indicators. The former are used to define manifestly unusual transactions and consist of facts which can be

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[82] J.C. Westerweel and J.L.S.M. Hillen (1994), *Measures to Combat Money Laundering in the Netherlands*, p.5.
[83] Section 8 of Disclosures Act.
[84] Lower House of the States General, 1992-1993 Session, 23 009, No 3, Disclosure of unusual transactions relating to financial services [Disclosure of Unusual Transactions (Financial Services) Act], Explanatory Memorandum, paragraph 5.2 in MOT, *Legislation Concerning Money Laundering in the Netherlands*, Ministry of Justice.
[85] *Ibid*, paragraph 5.3.

established objectively and whose presence lead to compulsory disclosure. Subjective indicators on the other hand are of a more qualitative nature and, in a similar vein to a suspicious transactions reporting system, require a subjective evaluation on behalf of the credit or financial institution.[86]

The list of indicators includes both a mandatory reporting system of transactions exceeding a certain amount and a reporting system in specific circumstances related to factors such as the mode of payment. Their detailed enumeration appears at first sight to assist objectivity and relieve credit and financial institutions from the heavy burden to ascertain suspicions. However, problems still remain: as the Public Prosecutor's Department has noted, some of the indicators are not really objectively assessable, with transactions 'atypical of the customer' and 'in unusual package' constituting characteristic examples.[87]

The inherent subjectivity in these examples brings to the fore arguments such as the one put forward by the Association of Dutch Banks (NVB), which opposed the unusual transactions terminology, arguing that the difference with suspicious transaction reports is 'mainly a question of semantics'.[88] This point is reinforced by the recent addition to the list of indicators of 'suspected money laundering transactions'.[89] The latter are defined, in a striking example of terminological resemblance with the suspicious transaction reporting system, as 'transactions where there is reason to believe that they may be related to money laundering'.

ii. Due diligence

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[86] *Ibid.* See also Westerweel and Hillen, *op. cit.*,p.12. The Explanatory Memorandum states as examples of objective indicators cash transactions in foreign currency, cash transactions in which the money is handed over uncounted and transactions involving identification problems, and as an example of a subjective indicator transactions which are atypical of a particular client, not being a part of the usual pattern of transactions, or a cash transaction in which money is provided in unusual packaging.

[87] Public Prosecutor's Department, Advisory Report to the Bill, in MOT, *op. cit.*, p.16.

[88] Association of Dutch Banks, Advisory Report to the Bill, in MOT, *op. cit.*, p.18.

[89] MOT, *Annual Report 1999*, Ministry of Justice, p.55.

The 'due diligence' duty is closely associated with both the identification and the reporting element of the directive. According to article 5, credit and financial institutions are under the obligation to examine 'with special attention' any transaction which they regard as particularly likely, by its nature, to be related to money laundering. The focus is shifted here to the examination of transactions, which have to be assessed on the basis of subjective criteria. After a heated debate in the drafting process,[90] the final version of the directive includes the vague reference to the 'nature' of the transaction, which causes great problems of legal certainty, while at the same time being of limited practical help. Similar problems arise from the inherent ambiguity in defining what constitutes 'special attention'.

The interpretative fluidity of the provision was illustrated by the Commission in its 1995 Report, where it was stated that while some member states implemented the 'due diligence' duty by establishing a number of specifically defined, additional obligations for the institutions concerned, others have not explicitly transposed it in their national legislation, as it is believed that the principle is implicitly encompassed in the implementation of other directive provisions, such as article 11(1) establishing internal control procedures.[91] The latter option has the potential to transform article 5, from a provision requiring explicit implementing measures, to a general, catch-all interpretative clause to the other directive duties, thus imposing an enhanced burden of compliance on the institutions concerned. The sole reflection of explicit interpretative guidance is found in the preamble of the directive, which calls, following the spirit of the FATF Recommendations and partly a series of proposals at the drafting stage,[92] on the institutions concerned to pay special attention to transactions with third countries which do not apply comparable anti-money laundering standards to those established by the Community or other international *fora*.[93]

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[90] See chapter 3.
[91] *Ibid.*
[92] *Ibid.* For an extensive overview of the drafting process in this respect see A.J. Ewing (1991), 'The Draft EEC Money Laundering Directive: An Overview' in *Journal of International Banking Law*, vol.4, p.142.
[93] Preamble, recital 13.

iii. Refraining from transactions

Closely related to the due diligence duty is the obligation of credit and financial institutions to refrain from carrying out transactions which they know or suspect to be related to money laundering until they have appraised the competent authorities. According to article 7 of the directive, those authorities may give instructions for the non-execution of the operation. In view of the difficulty of implementing this duty in every day commercial transactions without harming the institutions public image and without raising suspicions on the part of the customer, the article provides that the institutions concerned may carry on with the suspected transaction where to refrain 'is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money-laundering operation'. In the latter case, the institutions shall apprise the authorities immediately afterwards.

As the boundaries between when to refrain from and when to execute a transaction are in many cases blurred, the margin of discretion in the implementation of this provision remains extended, especially in cases of suspected money laundering. In cases when an institution refrains from the execution of a transaction which was wrongfully suspected, major issues of concern arise regarding the liability of the institution concerned, and/or the competent authorities, towards the customer. As the former are exonerated from liability when acting in good faith, on the basis of article 9 of the directive, there is a danger, in cases when they wrongfully refrain from transactions, of the customer being subjected to a considerable loss. The danger is more acute in cases of non-execution of the transaction, should the competent authorities ordering it remain exempt from liability as well. Such exoneration would be regrettable, especially in view of the intervention, in this case, of a public, or *quasi*-public authority in an otherwise private contractual relationship. [94]

[94] See also the comments of Ewing, referring to contradictory statements by the Commission in this respect in the course of its communications to the Parliament in the adoption process. Ewing, *op. cit.*, p.144.

iv. Tipping off

A further duty related to the reporting mechanisms is established by the 'tipping off' provision of article 8. Here, credit and financial institutions and their directors and employees shall not disclose to the customers concerned nor to other third persons that information has been transmitted to the authorities on the basis of the reporting duties of article 6 and the duty to refrain of article 7. They should also not disclose that a money laundering investigation is being carried out.

The general character of the provision, along with its lack of explicit demarcation of the circumstances in which the banker is under the duty not to 'tip off', have led to the need for further elaboration at the national level. This is evident in the UK Guidance Notes, where the need for interpretative guidelines was more acute in view of the establishment of 'tipping off' as a criminal offence![95] These reflect a noteworthy attempt to narrow the scope of the duty only to cases expressly referred to in the directive. In a paragraph that is worth quoting at length, it is stated that:

> '...a tipping off offence cannot arise unless the person concerned knows or suspects that a suspicious transaction report has been made either internally, or to the National Criminal Intelligence Service (NCIS), or alternatively knows or suspects that police or customs are carrying out or intending to carry out a money laundering investigation. Therefore preliminary enquiries of a prospective customer by financial sector staff, either to obtain additional information to confirm the true identity, or to ascertain the source of funds or the precise nature of the transaction being undertaken, will not trigger a tipping off offence before a suspicious transaction report has been submitted in respect of that customer unless the enquirer has prior knowledge or suspicion of a current or impending investigation. Tipping off a suspect must be undertaken knowing or suspecting the consequences of the disclosure for an offence to be committed. Enquiries to check whether an unusual transaction has a genuine commercial purpose will not be regarded as tipping off.

[95] See chapter 4.

However, if the enquiries lead to a subsequent report being made then the customer must not be informed or alerted.'[96]

Such detailed guidance is however not sufficient to resolve the sensitive position of the institutions or persons under the duty to comply with the 'tipping-off' provision. Here again the former are placed within a *quasi*-policing role, aligning with the authorities against a suspect customer. A series of human rights issues arise in this context, in particular in view of the fact that the customer concerned is at the stage of being *suspected* and not proven guilty of an offence. Such issues were clearly illustrated in the recent case of *C v. S and others*,[97] which involved an institution which had already submitted suspicious transaction reports to the NCIS and subsequently was placed under a High Court order to produce information and documentation about accounts or customers which could reveal money laundering.

As was acknowledged by the Court of Appeal, in this case the institution concerned was placed in an 'invidious' position, as: compliance with the Court Order signified a risk of being prosecuted under the 'tipping-off' provision, as the production of documents could reveal the existence of a money laundering investigation; and compliance with the money laundering legislation, which would lead to the institution not producing the requested documents, placed them in contempt of Court.[98] The Court went on to state that the NCIS investigation in this context created a three-fold conflict between the interests of the state in combating crime on behalf of the public and:

-. The entitlement of a private body to obtain redress from the court;

-. Fair trial principles, namely that justice should be administered in public, that a party should know the case which is being advanced by another party and should have the opportunity to reply to it; and

-. The principle that a party who comes before the courts is entitled to know the reasons for the courts' decisions.[99]

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[96] Joint Money Laundering Steering Group, *op. cit.*, paragraph 2.07.
[97] (1999) 2 *All ER*, pp.343-351.
[98] *Ibid.*, p.345.
[99] *Ibid.*, p.348.

In addressing this conflict, the Court, which, as seen above viewed the institutions duty not to tip-off within a public interest context of the fight against crime, asserted that the importance of these principles cannot always be paramount facing the public interest and proceeded to give extensive guidance as to how such conflicts are to be reconciled in similar cases. As will be seen extensively below, the Court's guidance is a manifest attempt to safeguard at least a minimum standard of rights, while at the same time acknowledging the predominance of the investigative aims of NCIS.[100] As the guidance principles largely depend, at the initial stage, on the initiative of the NCIS, which receives in the first instance the institution's request for clarification,[101] the position of the institutions concerned is far from clear and the possibility for the existence of conflicting duties still present. Guidance has however been welcome by legal circles representing institutions in these cases as a pragmatic way of dealing with the situation.[102]

The conflict created by the 'tipping-off' provision was recently acknowledged by the European Parliament in its reading of the Commission's draft money laundering directive.[103] The Parliament acknowledged that, along with a statutory obligation of secrecy, there is also a statutory duty to warn clients with a view of protecting them from harm. On the basis of this justification. the Parliament amended article 8 to establish a duty not to 'tip-off' *'unless the person or institution concerned is required to do so by legislation relating to the profession concerned'*.[104] This qualification to the duty takes into account the particularities of

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[100] See chapter 6.

[101] According to the Court, as soon as a financial institution is aware that a party to legal proceedings intends to apply for, or has obtained, an order for discovery which might involve disclosure of information which could prejudice the investigation, it should inform the NCIS of the position and the material which it is required to disclose. The latter will then have the opportunity to identify the material which it does not wish to be disclosed and indicate any preference regarding how an application or order is handled.

[102] Lovells (2000), *Money Laundering: A Dilemma Resolved?,* Client note: A guide for banks and financial institutions.

[103] See part 4.

[104] European Parliament, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (1999i), *Draft Report on the Proposal for a European Parliament and Council directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for*

the new professions which will be included in the scope of the directive,[105] while acknowledging similar situations in the banking and financial sector.

v. Reporting by supervisory authorities

Article 10 of the directive extends the duty to report to supervisory authorities. They are placed under the obligation to report any fact that could constitute evidence of money laundering if they discover it in the course of inspections carried out in credit and financial institutions or *in any other way.* [106] This broad reporting obligation entails far-reaching implications for the duty of confidentiality of bank supervisory authorities as put forward in EC law.[107] Beyond the reactive breach of confidentiality in a specifically enumerated number of cases, supervisors are here placed under an extensive proactive duty to cooperate with the anti-money laundering authorities by reporting a wide range of facts which they subjectively ascertain 'could constitute evidence of money laundering'. The duty extends far beyond the analogous duties of credit and financial institutions in a two-fold manner: by the broad reference to 'any fact', rather than suspicions from specific transactions; and by the discovery of facts not only in the course of inspections, but 'in any other way', thus placing supervisors not only in a policeman's, but rather in a detective's shoes.

C. Organisational duties

Article 11 places credit and financial institutions under the duty to establish procedures of internal control and communication in order to forestall and prevent money laundering operations. At the same time, they are obliged to adopt awareness measures, such as training programmes for the employees, to ensure the correct implementation of the directive. This constitutes a significant attempt

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the purpose of money laundering, Repporteur: K.-H. Lehne, Drafsman: D.R. Theato, DOC. PRELIMINARY 1999/0152(COD)-F1 REV.1, 16.12.1999, p.14.

[105] See part 4.

[106] Emphasis added.

[107] See supra, part III(2)(e).

towards self-regulation and the creation of an anti-money laundering ethos in the institutions concerned. It seems surprising in this light that some member states, such as the United Kingdom, have opted for the criminalisation of the breach of this obligation. Not only is criminalisation manifestly incompatible with any concept of self-regulation, but it may also lead to the creation of a broad, strict liability offence.[108]

4. THE EXTENSION OF THE DUTIES TO OTHER INSTITUTIONS AND PERSONS

I. GENERAL

The preventive anti-money laundering framework was initially confined to a series of credit and financial institutions. Subsequent developments in the field have however demonstrated an increasing tendency for the use of other sectors of production for the purposes of money laundering.[109] As seen above, these developments led to an awareness of the necessity to revise money laundering counter-measures and the revision to a great extent of the FATF Recommendations. At the same time, a series of calls were made by EC institutions and the Contact Committee established by the 1991 directive, for a revision of the EC money laundering legislation to take into account these new developments.[110] This policy *impetus* has been clearly reflected in the recent Commission's proposal for a draft money laundering directive amending directive 91/308.[111]

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[108] J. Dine (1995), *Criminal Law in the Company Context*, Dartmouth, Aldershot, Brookfield USA, Singapore, Sidney, p.116.
[109] See chapter 3.
[110] For a detailed analysis see chapter 3.
[111] Commission of the European Communities (1999), *Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering*, COM (1999)352 final, Brussels, 14.7.1999.

The draft directive extends the scope *ratione personae* of its predecessor in two ways: by adding to the list a number of additional financial institutions; and, most significantly, by extending the list to legal and natural persons outside the financial sector. The financial institutions list is to be amended to include an express reference to *bureaux de change* and money transmission/remittance offices and to investment firms as defined in Directive 93/22/EEC on investment services.[112] The amendment was deemed necessary in view of the doubts as to whether these institutions were already covered by the money laundering directive.[113]

New article 2a on the other hand, would extend the scope of the directive to a wide range of non-financial professions, when acting in the exercise of their professional activities. The list includes accountants and auditors; real estate agents; notaries and other independent legal professionals in a series of activities; dealers in high-value goods and transporters of funds; and persons related through operation, ownership or management, with the casino industry.

The proposal is far from clear regarding the exact definition of professions in several instances, the most notable one being the broad reference to dealers in high value goods. The catch-all character of the term, along with the non-exhaustive enumeration of examples in the directive, has the potential to over-extend its scope and to render the Commission's reservations on including professions such as art dealers meaningless, as they can be caught under the 'high-value' dealer heading. The greatest challenges, however, are linked with the inclusion of legal professions.

II. THE SPECIAL CASE OF LEGAL PROFESSIONS

Perhaps one of the most controversial aspects in the anti-money laundering legislation is the imposition of the preventive obligations on lawyers. The challenges surrounding the imposition of these duties on credit and financial

[112] New article 1(B).

institutions bound by confidentiality emanating from their trust relationship with the customer, become magnified in this case. The lawyer-client relationship is one with an increased level of trust, and professional confidentiality is essential to protect fundamental human rights and rule of law principles, such as guaranteeing a fair trial and safeguarding defence rights. This has been eloquently put forward at the Belgian Senate during discussions on introducing analogous duties in Belgian legislation. It was noted that:

'The fundamental right of the accused to be judged under an equitable process implies the right to be defended appropriately. It cannot be guaranteed that the accused has the possibility to communicate to her lawyer all the information necessary for her defence. Would the client do this unreservedly to the extent that she knows that her lawyer is obliged to provide to the authorities information which could be prejudicial to her? Does this not place at stake the principle of fair trial (*proces équitable*)?'[114]

In view of the enhanced trust between lawyer and client and the particular significance of confidentiality in their transactions, the imposition of money laundering duties on lawyers has the potential to create a conflict of interest for a lawyer between concerns to ensure the effective administration of justice on the one hand, and protecting the client's interests on the other, with a further parameter being the protection of the lawyer's interests *per se*.[115]

The imposition on lawyers of duties under the money laundering legislation thus challenges a well-established principle of professional confidentiality permeating the lawyer-client relationship.[116] Although it has been acknowledged that there are significant differences between Western European countries as to its protection, with some using criminal law and others civil law, it has been acknowledged that:

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[113] Commission of the European Communities, 1999, p.7.
[114] Senate of Belgium, Parliamentary Archives, Session of 2.7.1998, DOC. 1-202, downloaded from www.senate.be
[115] Council of Europe, *Lawyers and Money laundering: The combat against money laundering and the fundamental rights of the defence*, DOC. DIR/JUR (95) 9, Strasbourg, 20.4.1995, p.15.
[116] On an overview of the situation in England and Wales, see A. Campbell (1999), 'Solicitors and the Prevention of Money Laundering' in *Journal of Money Laundering Control*, vol.3, no.2, pp.135-142.

all countries afford some degree of protection to the confidential relationship between lawyer and client; and that this protection is primarily achieved through a lawyer's duty not to disclose matters discussed with a client.[117]

The same considerations were reiterated by the European Court of Justice, in a judgment concerning the Commission's investigatory powers under a competition law regulation.[118] Judging on the applicability of the protection of confidentiality in Community law, it was stated that:

> 'Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it'.[119]

These considerations led the Court to interpret the competition legislation as protecting the confidentiality of written communications between lawyer and client under two conditions: that such communications are made for the purposes and in the interests of the client's rights of defence; and that they emanate from independent lawyers, that is to say lawyers who are not bound to the client by a relationship of employment.[120]

Notwithstanding its limited concern with the Commission's powers in the specific realm of competition law and the limitation of the protection of legal privilege to a specific kind of communication and specific lawyer-client relationships, the importance of the judgment cannot be underestimated in

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[117] Council of Europe, *op. cit.*, p.5.
[118] Case 155/79, *AM & S Europe Limited v. Commission of the European Communities* [1984] ECR 1575.
[119] *Ibid*, paragraph 18.
[120] *Ibid,* paragraphs 21,22.

acknowledging both the need to protect the principle of confidentiality and its association with rule of law issues. At the same time, however, and in spite of the acknowledgement of lawyer-client confidentiality as a general principle, it is evident that no common criteria exist with regard its protection and its scope.

Such delimitation issues were prominent in the conclusions of the Contact Committee regarding the inclusion of legal professions in the revised money laundering directive. It was noted that, while the majority of national delegations considered that legal professions could be made subject to the directive provisions when they carry out some kind of financial intermediation in financial transactions, there was a number of delegations which felt unable to make any distinction between the different services which members of the legal professions might provide to their clients and pointed out that discretion and client confidentiality in these cases is absolute. Other member states opted for the exploration of possibilities of self-regulation prior to thinking of subjecting legal professions to the anti-money laundering legislation.[121]

The response of the Commission has been to place legal professions in the scope of the directive only in specific circumstances and to differentiate them from the other persons or institutions covered by the directive with respect to their reporting requirement. Article 2a thus refers to notaries and other independent legal professionals in respect of the execution of a non-exhaustive list of financial activities. According to revised article 6(3), member states shall not be obliged to apply the directive's duties to these professionals with regard to information they receive from a client in order to be able to represent him in legal proceedings.

This differentiation also extends to reporting modalities. Article 6(3) empowers member states to provide in that case that the competent authority receiving the reports by these professionals is, exceptionally, the bar association or appropriate self-regulatory body of the profession concerned. These bodies may in addition be

[121] Commission of the European Communities, 1998, p.11.

exempted from the new obligation to exchange information on suspicious transactions with the Commission in case of fraud, corruption or any other illegal activity damaging or likely to damage EC financial interests.[122]

The tensions in the Commission's effort to reconcile deeply rooted confidentiality traditions with the perceived need to involve legal professions in the fight against money laundering are evident. In pursuing the latter, the Commission opted for a familiar 'minimum standard' strategy, by confining the legislation to specific categories of professions and circumstances, while leaving possibilities for extension open. In the case of legal professions, however, this has resulted in considerable vagueness and uncertainty as to the scope of the proposed legislation. While the enumeration of financial transactions in the course of which legal professions will be bound by the directive is welcome, the abstract and catch-all reference to the 'execution of any other financial transactions' opens the provision to a wide range of interpretations.

In the same way, the derogation from the duties with regard to information received in order to represent a client in legal proceedings is substantially limited, as it does not cover 'any case in which there are grounds for suspecting that advice is being sought for the purpose of facilitating money laundering'.[123] The element of suspicion is further broadened here with the reference to more general 'grounds for suspecting', potentially bringing into the fore already criticised tests of 'reasonableness'.[124]

5. THE EMERGENCE OF 'RESPONSIBILISED' CITIZENS: MONEY LAUNDERING COUNTER-MEASURES AS A NEW FORM OF GOVERNANCE

[122] Article 12(3).
[123] Article 6(3).
[124] See part 3B.

A core element of the strategy to counter criminality which occurs due to and through every day transactions has been to mobilise organisations and individuals situated outside the state apparatus and to ensure their participation in the fight against crime. This call for active citizenship has been pertinently named as the 'responsibilisation strategy'.[125] The term was put forward by Garland, who noted that the recurring message is the displacement of the state's responsibility for preventing and controlling crime. The state cannot fulfill these tasks alone and thus requires the active cooperation of citizens: the latter 'must be made to recognize that they too have a responsibility in this regard, and must be persuaded to change their practices in order to reduce criminal opportunities and increase informal controls'.[126]

The money laundering directive constitutes one of the most striking examples of responsibilisation. An increasing number of institutions and individuals are called to cooperate with state authorities in the fight against money laundering. This call is justified in a two-fold manner. First of all, money laundering counter-measures are viewed as essential in order to combat transnational criminality, which is projected by the EC institutions as a serious security threat. At a parallel level, this securitisation process is inextricably linked with emotionally charged discourses of demonisation and moralization. On the one hand, many of the institutions and individuals concerned are deemed to take part, in an active or passive way, in money laundering activities, thus enforcing the threat of transnational crime. On the other, and partly exactly because of this fact, their participation in the fight against money laundering is deemed essential because the state cannot counter the problem alone. Citizens have to cooperate with the authorities because of their moral obligation to safeguard society from the threat of money laundering and organised crime.

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[125] As seen in chapter 1, the term was introduced by Garland in: D. Garland (1996), 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' in *British Journal of Criminology*, vol.36, no.4, pp.452 *et seq.*

[126] Garland, *op. cit.*, p.453.

This securitisation/moralisation crusade has led to the imposition of an unprecedented set of duties on credit and financial institutions, and most probably to an extended range of non-financial professions. The repercussions of these duties cannot be disregarded: first of all, the institutions and individuals involved are under the obligation to 'know' in the most complete possible way the people with whom they transact in every day life. In stark contrast with well-established bonds of confidence and trust, they have to conduct checks, investigate and gather information on their customer's private affairs. In a predominant climate of suspicion, they then have to evaluate and report a wide range of every day, personal information to the authorities responsible for countering money laundering. Citizens are thus placed under the heavy duty to cooperate in a proactive manner with the authorities, by providing, on their own initiative, information about other citizens. This process, characterised by commentators as the 'new policing',[127] alters significantly every day social interaction, and has the potential to challenge fundamental principles of human rights and the rule of law.

Compliance with this new set of duties has been aimed through two mechanisms. First of all, in order to soothe the fears of credit and financial institutions that they would be liable to their customers in cases of wrongful disclosure, article 9 of the directive provides that the disclosure in good faith to the authorities of information under the reporting and refraining duties shall not constitute a breach of any restriction or disclosure of information and shall not involve the institution, its directors or employees in liability of any kind. The vagueness of the provision- inherent in the very use of the term 'good faith'- aside, such exoneration of liability weakens considerably the position of customers and opens the door to a maximum disclosure policy. In view of this danger, the recent proposal by the European Parliament to replace the term of 'good faith' by establishing exoneration from liability 'unless the disclosure is deliberate or the information disclosed is untrue owing to gross negligence' is an interesting development in the field. According to the Parliament, the 'good faith' terminology is no longer adequate, especially in

[127] M. Levi (1997), 'Evaluating the 'New Policing': Attacking the Money Trail of Organized

view of the extension of the *ratione personae* scope of the directive. It should be replaced with more precise wording in order to prevent abuse and ensure the exercise of a degree of care.[128]

Similar terminological problems in the application of the provision in the banking sector were encountered in Finland. There, customer protection considerations led to the replacement of section 97 of the 1994 Act on Credit Institutions establishing a general exoneration from liability, with the new section 15 of the 1998 money laundering Act. It provides that:

> 'a party under obligation to report shall be liable to damages for financial loss caused to a customer due to clearing a transaction, reporting of a suspicious transaction or suspension or refusal of effecting a transaction only if a party under obligation to report has failed to exercise due diligence in a manner that, considering the circumstances, could have been expected from it'.[129]

It is evident that the absolute exoneration from liability has been significantly watered down with the express reference to liability for damages. This, along with the uncertainty caused by the abstract reference to 'expected due diligence' has caused concern in the banking sector.[130] The conflict between the banker's duties to the customer on the one hand, and the money laundering authorities on the other, may end up as a double burden for the institution concerned.[131] This conflict highlights the paradox in the current anti-money laundering legislation: on the one hand, through he duties of the institutions and persons concerned and their exoneration from liability, the position of the customers is significantly weakened and their rights undermined; on the other hand, exoneration from liability, though detrimental to the customers' interests, is one of the principal incentives for

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Crime' in *The Australian and New Zealand Journal of Criminology*, vol.30, pp.1-25.

[128] European Parliament,1999i, p.14.

[129] For a version of the Act in English, see (1998) *Commercial Laws of Europe*, vol.1, pp.537-544.

[130] Officials of the Finnish Bankers Association and a principal Finnish credit institution, personal communication, Helsinki, 24.3.1998.

[131] On a recent general comment on the relationship between criminal and civil law in the development of money laundering counter-measures, see Ch. Nakajima (1999), 'Countering Money

compliance, and non-compliance results in the imposition of draconian penalties.[132]

The directive is silent as to the nature of these penalties. This has led to considerable diversity in its implementation. The majority of the member states have opted for administrative penalties in case of breach of the duties by credit and financial institutions.[133] Other countries, however, with the notable example of England and Wales, opted for sanctioning the breach of some duties by means of criminal law penalties.[134] The situation has not changed in the new draft directive, in spite of the noteworthy reference of the Action Plan on organised crime to making the failure to report suspicious transactions liable to dissuasive sanctions.[135]

Rather than opting for the creation of 'internal moralities' through mechanisms of self-regulation,[136] compliance is attempted through the threat of legal sanctions, which is magnified by the recourse to criminal law measures. Even the attempt to establish internal training programmes is accompanied by the threat of sanctions, with the extreme example of England and Wales, where the failure to establish mechanisms in view of achieving an 'internal morality' is treated as a criminal offence![137] Such an approach may have a quantitative impact in terms of an increase in reports by the institutions concerned, but does little to promote a

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Laundering Needs More Than Criminal Measures' in *Money Laundering Monitor*, Issue 6, November, pp.2-3.

[132] Article 14 of the directive calls at member states to take appropriate measures to ensure full application of all the directive provisions and to determine the penalties to be applied for infringement of the measures adopted pursuant the directive.

[133] For an overview, see Commission of the European Communities, *First Commission's Report on the implementation of the Money Laundering Directive (91/308/EEC) to be submitted to the European Parliament and to the Council*, COM (95) 54 final, Brussels, 3.3.1995, pp.15-16.

[134] See the analysis on 'tipping-off' *supra* and chapter 3.

[135] Recommendation 26.

[136] P.Selznik (1994), 'Self-Regulation and the Theory of Institutions' in G. Teubner, L. Farmer and D. Murphy (eds.), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization*, John Wiley and Sons, Chichester, New York, Brisbane, Toronto, Singapore, p.400.

[137] See part 3C.

qualitative change in the attitude of institutions and individuals towards the 'criminogenic situation'.

In the cold language of numbers, the results of this unprecedented mobilisation are rather disappointing. In countries with already developed anti-money laundering mechanisms, such as the United Kingdom and the Netherlands, a considerable number of suspicious transaction reports has been recorded over the past five years. However there, as in all other member states, the number of convictions on the basis of these reports has been minimal.[138] This has been acknowledged recently in a report by the European Parliament, stating that:

> 'While the picture regarding convictions for money laundering is still incomplete, it is impossible to draw reliable conclusions as to whether criminal law provisions in the EU are making for effective punishment. However, the statistics available appear to indicate that only very few people are convicted for money laundering. The explanation undoubtedly lies in part in the difficulty of marshalling corroborative evidence, but a further consideration to take into account is the fact that money laundering has to some extent shifted to activities which are not as tightly supervised as the financial sector.'[139]

This assertion certainly does not explain the discrepancy between the number of reports by the tightly regulated financial sector and the resulting convictions. What it does reflect, however, is the argument that the value of the directive duties also lies in its deterrent effect:[140] launderers now take advantage of the regulated

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[138] See the data provided in Commission of the European Communities, 1999, pp.43-44. An eloquent example is that of the United Kingdom, where suspicion transaction reports ranged from 13,710 to 16,125 between 1995 and 1998 (see National Criminal Intelligence Service, Disclosures 99, DOC 09/99, downloaded from www.ncis.co.uk). At the same time, the Commission notes, there were only 25 convictions for money laundering between 1993 and 1996. What is most impressive, is that only one prosecution for money laundering resulted form a suspicious transaction report! However, there were over 200 known prosecutions for other offences in 1996 as a result of reports passed on to police or investigative authorities. This raises in its turn serious concerns about the protection of individuals in cases where information is used for purposes other that the combating of money laundering.

[139] European Parliament, Committee on Legal Affairs and Citizens' Rights (1999ii), *Report on the Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive*, Rapporteur: E. Newman, Draftsman: E. Lambraki, DOC. A4-0093/99, 26.2.1999, p.23.

[140] On the deterrent or 'criminal exposure' effect of money laundering counter-measures see also Gold and Levi, *op. cit.*, p.63.

institutions to a much lesser extent, as they tend to use other sectors of the economy not covered by the legislation. This leads to a call for the extension of the scope of the anti-money laundering duties beyond the financial sector, to cover a wide range of organisations and individuals deemed as vulnerable for money laundering abuse.

This 'hide and seek' approach reflects the tendency to involve the broadest possible section of society in the fight against money laundering and organised crime.[141] This development mirrors the emergence of a new form of governance, and is accompanied by serious challenges to fundamental social and legal norms, the rule of law and human rights. The money laundering duties constitute perhaps the leading paradigm of these new structures in EU law.[142] It remains to be see n how these duties will influence or will in their turn be influenced by the emerging tendency to involve citizens in the fight against organised crime.[143]

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[141] A further extension, linked to the 'financial institutions' aspect, is the one put forward by the draft European Parliament and Council Directive 'on the taking up, the pursuit and the prudential supervision of the business of electronic money institutions' (COM(1998)461 final, Brussels, 21.9.1998), whose article 2(3) provides that directive 91/308 shall apply to electronic money institutions.

[142] A parallel development in this field has been the imposition of cooperation duties to private enterprises in the EC precursors legislation, that is the Regulations and Directives adopted in order to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances (Regulation 900/92 of 31.3.1992) and to regulate the manufacture and placing on the market of these substances (Directive 92/109/EEC of 14.12.1992). Both laws impose to natural and legal persons involved in the manufacture, production, trade or distribution of precursors a duty to notify the competent authorities of any circumstances which may demonstrate links with the use of the substances for the manufacture of illicit drugs. See W.C. Gilmore and A. Brown (1996), *Drug Trafficking and the Chemical Industry*, Hume Papers on Public Policy, vol.4, No.1, Edinburgh University Press, Edinburgh.

[143] The involvement of civil society in the prevention of organised crime is one of the leading issues in the EU Tampere Summit of October 1999. A background paper on the Summit urges the adoption of basic prevention guiding principles, which should encourage 'partnerships between the

authorities and local community organizations, the business community and other sectors of civil society'. DOC Tampere: Serious Cross-Border Crime, Luonnos 1 (7), 17.6.1999.

6

Securitisation through the administration of knowledge: the emergence of financial intelligence units in the European Union

1. INTRODUCTION

The establishment of comprehensive anti-money laundering structures brought to the fore the central role of information exchange and analysis. The duties of customer identification, record keeping, and suspicious transactions reporting, imposed on credit and financial institutions by the money laundering directive,[1] signal the beginning of the accumulation of a wide range of information on every day commercial transactions by citizens. Information which has been gathered in this manner is channeled through various investigation mechanisms, aiming at rendering it a useful policing tool in the fight against money laundering. This chapter will focus on this 'information journey' in the European Union by examining in turn: the establishment and function of novel 'competent authorities' responsible for receiving and analysing suspicious transaction reports; the establishment of communication networks between them, facilitating international cooperation; and their interaction with the EU authorities competent for combating transnational criminality. The analysis will then be complemented by an overview of the challenges posed by the establishment of such networks and their highly invasive character to the protection of fundamental human rights and the capacity of existing legislative measures to face them.

[1] OJ C106, 28.4.1990, p.6, articles 3,4 and 6.

2. THE FINANCIAL INTELLIGENCE UNITS

I. GENERAL

As seen above,[2] article 6 of the EC money laundering directive places credit and financial institutions under the duty to report, on their own initiative, 'any fact which might be an indication of money laundering', to the competent authorities. However, the text does not contain any further specification regarding the nature and function of such authorities, leaving the matter to the discretion of the Member States. This has resulted in the establishment of a diversity of units responsible for gathering and processing suspicious transaction reports in the European Union. This analysis will examine such units under a three-fold distinction between independent/administrative, police and judicial units.[3] Facing a plethora of similar, but not identical, distinctions, the choice has been made to focus on what the prominent nature of the unit is. Rather than attempting a mosaic of 15 different systems, the analysis will attempt an in depth view of one national unit as a characteristic example of a model, while adding some comments on similar units in other Member States.

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[2] Chapters 3 and 5.

[3] The distinction is similar with that used by J.-F. Thony, who distinguishes between a police, a judicial and an *ad hoc* (administrative) option. See 'Processing Financial Informaton in Money Laundering Matters: The Financial Intelligence Units' in *European Journal of Crime, Criminal Law and Criminal Justice*, 1996, no.3, pp.257-282. The article was also published in French: 'Les Mécanismes de Traitement de l'Information Financière en Matière de Blanchiment de l'Argent', in *Revue de Droit Pénal et de Criminologie*, 1996, vol.11, pp.1031-1062. The Commission of the European Communities on the other hand, follows a slightly different categorisation between: intermediary bodies (such as those in Belgium, Finland (FSA), France, Greece, Italy, the Netherlands and Spain); police authorities (in Austria, Finland (MLID), Germany, Ireland, Sweden, the United Kingdom); judicial authorities (in Luxembourg and Portugal); and a mixed police/judicial authority in Denmark. See Commission of the European Communities, *Second Commission Report to the European Parliament and the Council on* the *Implementation of the Money Laundering Directive*, COM (1998)401 final, Brussels, 1.7.1998. In the Danish system, the Money Laundering Secretariat is based within the Office of Public Prosecutor for Serious Economic Crime (Mr. Jens Madsen, Assistant Public Prosecutor, personal communication (letter), 9.4.1999). A similar distinction is made by B. Verhelst, deputy director of the Belgian FIU (CTIF/CFI) in his paper 'The Organisation of a Financial Intelligence Unit', presented in the Mercosur Seminar on Money Laundering, Buenos Aires, 26-28.5.1998 (unpublished manuscript).

II. CATEGORISATION

A1. The independent model: the Netherlands (with notes on Greece)

In the Netherlands one of the laws implementing the EC money laundering Directive, the 'Disclosure of Unusual Transactions Financial Services Act' of 16 December 1993, established an independent Disclosures Office responsible for receiving unusual transaction reports from credit and financial institutions.[4] The establishment of the Office (MOT as it is called in Dutch) was a sharp break from the previous years, replacing an informal system based on the banks' initiative, which employed former policemen to work in their security departments.[5] Since 1992, Banks reported suspicious transactions on a voluntary basis to the Financial Police Desk (FINPOL) of the Dutch criminal intelligence service (CRI).[6]

A prominent feature of the Dutch policy has been the persistence on the independence of the Disclosures agency. Rather than being directly connected with the police, MOT acts as a filter between financial institutions on the one hand and the police and judiciary on the other.[7] MOT is deemed an 'interpreter', speaking both language of the private sector and that of law enforcement.[8] This choice is closely associated with the establishment of an unusual, rather than suspicious, transaction reporting system in the Netherlands. The *rationale* behind this system lies in the fact that the staff of credit and financial institutions are not qualified – and should not be required – to assess with certainty whether a transaction is

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[4] Section 2 of the Act. Unlike most EU countries, whose anti-money laundering framework is based on the reporting of suspicious transactions to financial intelligence units, the Dutch system places credit and financial institutions under the duty to report unusual transactions. A stage prior to suspicion, the assessment on whether a transaction is unusual is based on a series of indicators. The latter can be objective, consisting of a series of facts, such as deposits over a certain amount, or subjective, which depend on the judgment of the institution. For a list of indicators, see J.C. Westerweel and J.L.S.M. Hillen (1996), *Measures to Combat Money Laundering in the Netherlands*, pp.19-20.

[5] Ms. T. Peeman, personal communication, Zoetermeer, 24.6.1998.

[6] H. A. C. Smid, National Public Prosecutor, 'Ways to Improve Suspicious Transaction Reporting', unpublished manuscript, Buenos Aires, 16 April 1997.

[7] Lower House of the States General, 1992-1993 Session, Explanatory Memorandum on the 'MOT' Act, supra note 1 (93-1627).

[8] Mr. H. Koppe, Director of MOT, personal communication, Zoetermeer, 24.6.1998.

suspicious or not.[9] In a similar manner, the establishment of an independent unit to 'filter' these reports, is aimed at preventing the 'unnecessary violation of the privacy of citizens and the disruption of relations between financial institutions and their clients'.[10]

The establishment of an independent disclosures agency caused a series of reactions. Major opposition was put forward by banks, whose objections were primarily centered on the 'unusual transaction' reports system. The Association of Dutch Banks (NVB) explicitly stated its preference for an internal selection of suspicious transactions within the institution, believing that the difference of opinion was 'mainly a question of semantics'.[11] The opposition to the interference of MOT was further reflected in the NVB's suggestion that the Disclosures Office forms part of the national intelligence service (CRI), stemming from the belief that this matter 'should be organised within the government apparatus and that external advisers should not be too heavily involved'.[12] In a similar spirit of distrust, the Public Prosecutions Department pointed out that 'the Disclosures Office itself is not a criminal intelligence service and does not have the authority to make policy choices concerning the provision of information to the police."[13]

Notwithstanding the negative reactions surrounding its establishment, the independent Dutch Disclosures Office[14] has been entrusted with a wide range of tasks, delineated by Section 2 of the Act to encompass: the 'filtering' and exchange of information; the provision of feedback to the reporting institution; money laundering research; and a consultative role to the industry. The agency is also under the duty to report to the Ministers of Justice and Finance.[15]

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[9] Westerweel and Hillen, *op. cit.*, p.5.
[10] Ministry of Justice/MOT (1997), *The Fight Against Money Laundering*, p.10.
[11] Advisory Report of the Association of Dutch Banks, in Explanatory Memorandum, *op. cit.*
[12] *Ibid.*
[13] Advisory Report of the Public Prosecutions Department, in Explanatory Memorandum, *op. cit.*
[14] It should be noted here that, according to Section 5 of the Act, responsibility for the general management, organization and administration of the Office shall rest with the Minister of Justice.
[15] The full tasks of MOT according to Section 2 are as follows: a. to collect, register, process and analyse the data it obtains to establish if such data could be relevant to the prevention and investigation of felonies; b. to supply personal particulars and other information in accordance with

The powers of MOT regarding the 'filtering' of unusual transactions expand to the collection, registration, processing and analysis of the data obtained by it, if such data is relevant to crime prevention and detection (Section 2(a)). These data are not limited to reports by credit and financial institutions; they also embrace information provided by Dutch and foreign police registers and foreign disclosure bodies, as well as data accessible to the public.[16] Furthermore, in accordance with Section 10 of the Act, MOT is empowered to request further data or information from disclosing parties or those conducting a financial service as defined in Section 1(a)(7) of the Act [17]and are involved in a transaction on which MOT has information. The explanatory memorandum of the Act defines data processing and analysis as 'establishing connections between items of information which have been received, thus increasing their value in relation to the items of information originally supplied by the financial institutions and making it possible to trace information that might be of relevance to the task of supplying information to other authorities responsible for fighting money laundering.[18] Upon the evaluation of a transaction as suspicious, MOT transmits it directly to the police regions, also on behalf of the National Public Prosecutor. This is a new system, in force since November 1997, which replaces the transmission of the MOT reports to the Public

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this Act and under and in pursuance of the Police Registers' Act; c. to inform the disclosing institution how the transaction disclosed has been dealt with in order to improve correct compliance with the disclosure requirement; d. to conduct research into developments in the field of money laundering and into improved ways of preventing and detecting the offence; e. to make recommendations to the relevant branches of industry concerning the introduction of appropriate internal control and communication procedures and other measures to prevent these branches from being used for money laundering; f. to provide information on preventing and detecting money laundering to the relevant branches of industry, the Public Prosecutor's Department and other public servants with similar functions and the public; g. to maintain contact with foreign law enforcement or non-law enforcement government-designated agencies that have a task similar to that of MOT; and h. to forward an annual report of activities and plans to the Ministers of Justice and Finance.

[16] Explanatory memorandum, *op. cit.* On the international exchange of information, see part 3 below.

[17] This section includes in the list of financial services 'the crediting or debiting of an account in which monies, securities, precious metals or other valuables may be held'.

[18] Explanatory Memorandum, *op. cit.*

Prosecutor, who relied on the Financial Police Desk (FINPOL) for their further refinement and physical dispatch.[19]

A vital condition for the effective processing and analysis of data is their registration, or their storage in 'an accessible and systematic manner'.[20] Section 4 of the MOT Act stipulates that the agency is to maintain a register, which is deemed as a register in the sense of the Police Registers' Act and lies within the responsibility of the Minister of Justice. According to the Explanatory Memorandum, the decision to opt for this Act and not for the Data Protection Act emanated from the consideration that 'the Office's tasks form part of police duties, namely the collection and provision of data for the purpose of the prevention and detection of criminal offences and are closely connected with the performance of police duties'.[21]

There has been an attempt to place such extensive powers within strict statutory limits. Section 4 of the MOT Act is supplemented by a second paragraph, stating that 'information from the register will be provided under the Police Registers' Act *only to prevent and investigate felonies*'.[22] In the same manner, the Police Registers' Act in Sections 14 and 15 makes the supply of data to police officers and the Public Prosecutor obligatory only to the extent that it is necessary in the performance of their duties.[23] Furthermore, Section 18 of the MOT Act places all persons who perform tasks furthering the application of the Act or of resolutions taken in its pursuance under a strict confidentiality duty. No further or other use and no disclosure of any data or information supplied or received in accordance with the Act can be made for any purpose other than what is required by the performance of their duties or by the Act.

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[19] MOT, *Annual Report 1998*, p.18. The direct transmission of the reports to the regional crime squads, rather than to FINPOL was deemed necessary after research on MOT showing that:a.a lot of MOT information were lost in the process, and b. that the image of the information at the end was frequently completely different from the initial report, due to the addition of a lot of new data. Mr. H. Nelen, Ministry of Justice, personal communication, the Hague, 26.6.1998.
[20] Explanatory Memorandum, *op. cit.*
[21] *Ibid.*
[22] Emphasis added.

However, these guarantees are not absolute. Article 12(d) of the Police Registers' Act provides that MOT data can be issued also when relating to a different purpose than that for which the file has been created when:

1. the issue takes place for the sake of inclusion in a CID file or a 'grey field' file;
2. it is reasonable to assume from the data that a certain person has committed an offence;
3. the issue takes place pursuant to article 15, section 1, ad a of the Act,[24] and these data can in reason be of importance for the prevention or investigation of offences as referred to in article 1, ad b;
4. the issue takes place pursuant to article 13, section 3 and refers to data which are necessary for investigating a crime by which the legal order in the country making the request is seriously undermined.

Further light on these exceptions is shed by Article 1 of the Act, where both the context of a CID and of a 'grey field' file are delineated. In accordance with Article 1(b), a CID file (or a file of the Criminal Investigations Department) means 'a file that has been created with a view to preventing or investigating offences which represent a serious contravention of the legal order in view of their gravity, frequency or the organised way in which they have been committed'. This definition is also of use for the delimitation of the scope of the 12(d)(3) exception. Article 1(d) adds that a 'grey field' file means 'a file which has been created with a view to establishing whether, in conjunction with other data, the data subject can be regarded as a CID subject'. A 'CID subject', according to Article 1(c) of the Act is 'a person involved as a suspect or who may reasonably be assumed will be involved as a suspect in relation to offences, on whom a CID file has been complied'.

The potential of MOT information being used for purposes other than the fight against money laundering is evident. Information may not only be procured for

[23] For an extensive analysis, see Explanatory Memorandum, *op. cit.*

issues related to criminal intelligence files, but also for 'grey field' files matters, occupying a stage prior to the official criminal investigation. It is important to note here that these files contain personal particulars which cannot immediately be connected with a CID subject and are based on 'tips and police surveillance'.[25] On the other hand, it is noted that the CID file ' serious contravention of the legal order' criterion is broader than the mere suspicion of having committed a criminal offence, since it also extends to future offences.[26] This has as a consequence the obligation of MOT to disclose, in addition to data on existing CID subjects, data on a person which are 'sufficiently reliable for inclusion in a CID file'.[27]

Further issues are raised regarding the continuous and increasing communication of MOT with other agencies in the Netherlands, both at the level of the 'filtering' of information by MOT and at the level of information exchange. According to the 1998 MOT Report, the agency, in order to assess the suspicious character of a transaction, matches data to a series of sources as diverse as: the Criminal Intelligence Department Subject Index (CIDSI); the Central Reference Index (HKS); the Municipal Personal Records database (GBA); the Legal persons database (VENNOOT); the Central Driving Licences Register (RDW); the Criminal Records Office (CJD); and the Verification and Information System for stolen or forged documents (VD).[28] On the other hand, the MOT has received requests not only from the police, but also from bodies such as the Royal Netherlands Military Police (KMAR), the Industrial Insurance Administration Office (GAK) and the Tax Information and Investigation Service (FIOD).[29]

The co-operation framework between the MOT and the FIOD is of particular interest. The two bodies co-operate on the basis of an Integrity Memorandum, which extended MOT's task to the identification of substantial fiscal fraud and

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[24] That is in cases of requests by the National Public Prosecutor.
[25] Explanatory Memorandum, *op. cit.*
[26] *Ibid.*
[27] *Ibid.*
[28] MOT, *op. cit.*, pp.16-17.
[29] MOT, *op. cit.*, p.14.

provided for a FIOD employee to work within the MOT in identifying relevant cases.[30] Along with the legal regulation of the limits of such co-operation, what is also of interest is the new elements brought by FIOD's work on an 'object detection' project, whose philosophy is 'to focus on suspect capital or goods (the object) although there is at that time no immediate connection to known crime or suspects'.[31] The extent of the influence of such methods to the 'subject-oriented' financial investigations approach remains to be assessed.

Similar issues arise regarding information exchange at the international level. According to Article 13 of the Police Files Decree, data from a police file within MOT may be issued to 'administrative or police reporting desks in other countries, designated by the authorities for that purpose, which have a task comparable to that of the reporting desk'.[32] The exchange is exempted from the procedure envisaged in paragraph 7 of the Article, which involves intermediary action by the National Police Agency or by the Ministers of Justice or the Interior.[33] The communication of data to foreign authorities is subject to the existence of guarantees for the correct use of the data and the protection of privacy,[34] and to the general condition, albeit with a broad exception, that they shall be used exclusively for the purpose for which they were issued.[35]

Further legal challenges related to MOT's powers are posed by technological advancements. As was mentioned before, MOT ascertains that an unusual transaction is suspicious and then transmits suspicious transaction reports directly to police regions in the Netherlands. The 'suspicious character' assessment is now abetted by MOTION, an automated system of typologies helping the faster

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[30] MOT, *op. cit.*, p.4.
[31] M. Pheijffer (1998), 'Financial Investigations and Criminal Money', in *Journal of Money Laundering Control*, vol.2, no.1, p.33.
[32] Article 13(3).
[33] *Ibid.*
[34] Article 13(4).
[35] Article 13(5). The article provides that in special cases, at the request of foreign police authorities, the controller may agree to the use of the issued data for a different purpose as necessitated to enable the police in that country to carry out their duties.

detection of suspicious transactions.[36] While the latter are still passed in writing to the police, the complementary PROMOTION system facilitates exchange through the creation of a suspicious transaction database and an on-line query system. While unusual transactions still remain invisible, the suspicious transactions database has the character of a police register, which is operational and may be consulted for investigation purposes.[37] This is linked to an effort to replace the written transmission of suspicious transactions to the police by a system of electronic submission.[38]

Notwithstanding a persisting number of objections,[39] the establishment of MOT as an independent agency responsible for 'filtering' financial information not only is praised by the FATF for operating effectively in most respects,[40] but also appears to be a choice securing to a great extent private and public co-operation on the one hand, and respect for principles of data protection and privacy on the other. The importance of an independent unit in this respect is also highlighted in the choice of the Greek legislature to establish a Committee for the prevention and control of money laundering.[41] According to the Presidential decree which set its terms of reference, the Committee is an 'independent administrative authority, whose members enjoy in the course of their duties functional and institutional independence, and act and decide in accordance with the Law and their conscience,

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[36] MOT, *op. cit.*, p.4.
[37] MOT, *op. cit.*, pp.18-19.
[38] MOT, *op. cit.*, p.4.
[39] See for instance a Public Prosecutor's viewpoint, against both the 'unusual transaction' reports system and the existence of MOT and in favour of the reporting of suspicious transactions to a central disclosure office under the supervision of the public prosecutors office: C.D. Schaap (1997), 'Money Laundering: A Public Prosecutor's Viewpoint', in *Journal of Money Laundering Control*, vol.1, no.3, p.211.
[40] See FATF, *Annual Report 1997-1998*, paragraph 56. The Report notes however the need to address the risks of non-cash money laundering and to pay attention to the lack of reports from the securities and insurance sectors. Comments are also made regarding the extension of the reporting requirement to other categories of professionals as well as regarding the refinement of the feedback and the exceptions available to reporting institutions.
[41] According to a member of the Committee, its establishment as an independent inter-ministerial body is set to ensure data protection and confidentiality. Mr. Leivadas, personal communication, Athens, 14.7.1999.

within the legal limits of confidentiality'.[42] The Committee, presided over by an appeal judge and comprising of representatives from the Greek Bankers Association, the stock market supervision committee and the economic crimes unit of the Ministry of Public Order,[43] is, according to the FATF, a 'unique structure for the receipt, investigation and analysis of suspicious transaction reports'.[44]

In some respects, developments in the MOT system may serve as test-cases for subsequent developmets at the EU level, this being particularly the case regarding the co-operation of MOT with fiscal authorities. However, weak points continue to exist: a broad margin is left for MOT information to be used for purposes other than the fight against money laundering; this is exacerbated by the concurrence of a multitude of bodies of a diverse legal nature in the information exchange mechanism[45] and by technological advancements in data analysis and communication. The existence of the detailed MOT and Police Registers' Acts, though an asset, needs to be complemented by new, comprehensive legal texts taking such parameters into account.

A2. The Administrative Model: France

France is one of the pioneering countries in the adoption of anti-money laundering legislation and the establishment of financial intelligence units. One year prior to the adoption of the EC money laundering directive, law 90-614 of 12.7.1990 established TRACFIN[46], a service responsible for receiving suspicious transaction

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[42] Presidential decree 401 of 26.11/10.12.1996, Article 1(2). The call for the establishment of the Committee was made in the main Greek anti-money laundering statute, law 2331/1995 (Article 7).
[43] V. G. Lambropoulos, 'Money Laundering has trebled in 1998', *To Vima* newspaper, 7.2.1999.
[44] FATF Report 1997-1998, paragraph 92.
[45] The issue has already been highlighted in the 'Two years MOT' report, asserting that 'too many organizations are involved, which at their own discretion, add and/or remove data to/from the transaction-information" G.J. Terlouw and U. Aron (1996), *Twee Jaar MOT. Een Evaluatie van de Wet Melding Ongebruikelijke Transacties*, p.112.
[46] TRACFIN: Traitement du Renseignement et Action contre les Circuits Financiers Clandestins. On the history and functions of the unit, see: P. Fond (1995), 'TRACFIN: Un Premier Bilan', in *Les Cahiers de la Securité Interieure*,pp.133-136; D. Gaillardot (1995) 'TRACFIN et la Lutte contre le Blanchiment d'Argent', in *Le Nouveau Pouvoir Judiciaire*, no.334, pp.17-18.

reports from the competent persons in financial institutions.[47] According to Article 5 of the law, the unit is placed under the authority of the Ministry of Finance, France thus adopting an administrative model of FIU. The provision continues attributing to TRACFIN the task of gathering all suitable information for establishing the origin of the sums or the nature of the operations involved in the report. Where the collected information, the provision continues, are evidence of facts possibly constituting a drug trafficking offence, TRACFIN refers the case to the Public Prosecutor.[48]

Crucial in the performance of the TRACFIN functions is the attribution to the unit of a special legal 'right of communication' with the financial sector.[49] This right has been analysed in the unit's powers to:

a. gather suspicious transaction reports;
b. communicate relevant elements of the report, if the transaction has already taken place;
c. gather all useful information from credit institutions, when the transaction has not taken place and there are no accessible data;
d. collect the written reports by credit institutions in cases of complex operations with no economic justification;
e. communicate the identity documents of clients, in order to reconstruct the whole of the operated transactions by a person who is the subject of a suspicious transaction report.[50]

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[47] This person is known as the 'TRACFIN correspondent' ('correspondent TRACFIN'): J.L. Herail and P. Ramael (1996), *Blanchiment d'Argent et Crime Organisé. La Dimension Juridique*, Presses Universitaires de France, p.72. Law 93-122 of 29.1.1993 facilitates transaction reports by permitting oral as well as written suspicious transaction declarations (Article 73, inserting Article 6bis).

[48] Law 96-32 of 13.5.1996 extended the scope of the money laundering offence to all '*crimes*' or '*délits*'.

[49] '*Droit de communication*': see Article 15. For an analysis see the TRACFIN Report of 1996 (www.finances.gouv.fr/DGDDI/activites/1996/tracfin.htm); and M. Vasseur, 'La loi du 12 juillet 1990 relative a la participation des organismes financiers a la lutte contre le blanchiment des capitaux provenant du trafic des stupefiants analysee du point de vue de ses repercussions sur le droit bancaire', in *Banque et Droit*, 'Le blanchiment de l'argent, la participation des banques a la lutte contre le blanchiment des capitaux provenant du trafic des stupefiants',Numero Special- Hors Serie, 25.10.1990, p.36. Vasseur is of the view that the law invests TRACFIN actually, and without saying so, with the powers of the judicial police.

[50] Herail and Ramael, *op. cit.*

At the same time, TRACFIN forms part of a network of bodies responsible for fighting money laundering and organised crime. In this framework, the role of the Central Office for the Repression of Serious Financial Delinquency (OCRGDF)[51]is crucial. That Office was established by the Interministerial decree of 9.5.1990 and its competence covers offences of an economic, commercial and financial nature connected with professional or organized crime, more particularly those relating to serious crime, terrorism or drug trafficking. Within the duties to promote, coordinate and study police action against serious financial delinquency, OCRGDF has the power, *inter alia*, to 'enter into relations and to correspond directly, for purposes of cooperation and exchanging information, with the central departments of other states carrying out similar assignments as well as with any other body having the repression of serious financial delinquency within its competence'.[52] At the level of international co-operation, law 96-392 extends the TRACFIN communication right to services of other States exercising analogous competences.[53] International co-operation is to be facilitated through the conclusion of a series of co-operation agreements with other FIUs.[54]

The extended powers and communication rights of TRACFIN are balanced by a series of data protection guarantees specifically enshrined in law. Article 16 of Law 90-614 limits the use of information gathered by TRACFIN only for the purposes of this law, sanctioning their further dissemination with criminal penalties. The 1996 provision enabling international co-operation in its turn,

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[51] Office Central de Repression de la Grande Delinquance Financiere. Other police services with anti- money laundering tasks are: specialised services of the central Direction of general information and of the Prefecture of the Paris Police, such as the brigade for financial research and investigation (BRIF); the Service for international technical police cooperation (SCTIP); the ORCTIS (Central Office for the Repression of Illicit Drug Trafficking) antennas in the Carribbean; the Interministerial Centre for Anti-Drug Education (CIFAD); and the sub-direction of financial and economic affairs in the Ministry of Justice. See Herail and Ramael, *op. cit.*, pp.71-77.

[52] R. Wack (1992), 'The Laundering of Capital', in *Action Against Transnational Criminality,* Volume II (Papers from the 1992 Oxford Conference on International and White Collar Crime), p.78.

[53] Article 5.

[54] According to the TRACFIN Report 1997, agreements are concluded with units in Australia, Italy, U.S.A., Belgium, Monaco, Spain, the United Kingdom, Argentina and Mexico (report downloaded from:www.finances.gouv.fr/DGDDI/activites/1997/tracfin.htm).

subjects it to the conditions of Article 22 of the 1990 law. These conditions are the respect of legal provisions and international conventions on the protection of privacy and data protection, and, under a reciprocity clause, the existence in the other contracting State of an equivalent strict obligation of professional secrecy.

The administrative model is appealing in combining the existence of a relatively independent-at least from the law enforcement authorities- authority responsible for directly communicating with reporting institutions with the existing infrastructure of organised administration. In the case of France, this independence is reinforced by a clearly defined protection of privacy. While the guarantees of independence of the agency contributed towards the co-operation of the initially reluctant French financial institutions, at the same time, however, they have created difficulties in finding a common 'field of understanding' with police institutions such as the OCRGDF.[55]

B. The Police Model: The United Kingdom (with notes on Finland)

The United Kingdom system of financial information exchange is based on the reporting of suspicious transactions.[56] In the case of credit and financial institutions, such transactions are reported at a first stage to what the 1993 Money Laundering Regulations call 'an appropriate person'. [57] The Money Laundering Reporting Officer, as such a person is referred to in practice, is under a duty to report the transaction, if she decides that 'there are no facts that would negate the suspicion'.[58] Following a 'police' model of information exchange and analysis, the transaction is then reported to the National Criminal Intelligence Service (NCIS), whose specialist Economic Crimes Unit is responsible for 'filtering' the report.

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[55] *'terrain d'entente'*. Herail and Ramael, *op. cit.*,p.86.
[56] The failure to disclose knowledge or suspicion of money laundering from certain offences constitutes a criminal offence. See chapter 4.
[57] Section 14.
[58] Joint Money Laundering Steering Group, Money Laundering, *Guidance Notes for the Financial Sector (Revised and Consolidated June 1997),* point 6.10. Records of suspicion that are not disclosed further are retained for five years from the date of the transaction. *Ibid*, point 6.4.

The National Criminal Intelligence Service was established without a specific statutory basis under the auspices of the Home Office in 1992 as a common police service. Its establishment reflected increasing calls for 'proactive' models of policing, focusing on: the identification of particular categories of offences or offenders; and the use of strategic initiatives against these.[59] The seemingly antithetical concerns regarding the lack of guarantees resulting from the lack of statutory basis on the one hand, and the need to intensify policing against organised crime,[60] led to the Police Act 1997, which established NCIS as a statutory body. Section 2 of the Act states that the NCIS Service Authority shall maintain a body to be known as the National Criminal Intelligence Service, whose functions shall be:

a. to gather, store and analyse information in order to provide criminal intelligence,
b. to provide criminal intelligence to police forces in Great Britain, the Royal Ulster Constabulary, the National Crime Squad and other law enforcement agencies, and
c. to act in support of such police forces, the Royal Ulster Constabulary, the National Crime Squad and other law enforcement agencies carrying out their criminal intelligence activities.[61]

The suspicious transaction reports from the private sector are referred to the Economic Crimes Unit (ECU), one of the specialised units in the NCIS UK Division Strategic and Specialist Intelligence Branch.[62] This unit brings together

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[59] S. Uglow and V. Telford (1997), *The Police Act 1997*, Jordans, p.2.
[60] The following comment by Baroness Blatch, Minister of State, in the House of Lords, is indicative: 'The National Criminal Intelligence Service and the regional crime squads have already achieved some impressive results...But we need to strengthen our capacity to tackle organised crime. We must harness the intelligence, the technology and the resources of the police, Customs and other agencies in a carefully co-ordinated national approach. We need a national response, in harmony with the local basis of policing in this country, to threats on a national scale'. In *House of Lords Parliamentary Debates*, No.1680, 11 to 14.11.1996, col.789.
[61] Section 2(1)(2).
[62] The other units are: the Drugs Unit; the Organised Crime Unit; the Specialist Crimes Unit; the Strategic Research and Development Unit; the Intelligence Co-ordination Unit; the Turkish

personnel from a range of law enforcement and government departments co-operating in combating money laundering. According to the NCIS 1997-1998 Annual Report, the functions of the unit are the following:

a. as the Financial Intelligence Unit (FIU) for the United Kingdom, it is the central national unit responsible for receiving and analysing financial disclosures in the UK, which are then forwarded to law enforcement for investigation
b. it provides a central advice, educational and consultancy services to United Kingdom law enforcement agencies, government departments and others on matters relating to financial intelligence and money laundering issues
c. it liaises with financial institutions, trade associations, and regulatory bodies regarding the education and training of Money Laundering Reporting Officers (MLROs)
d. it exchanges financial intelligence and participates in training with foreign FIUs, and provides assistance to other countries seeking to establish FIUs and draft appropriate anti money laundering legislation
e. it provides input to money laundering policy formation by close liaison with government departments through such bodies as the Joint Money Laundering Steering Group and the Home Office Working Group on Asset Confiscation. At an international policy level, the ECU plays a significant role as part of the UK delegation to the Financial Action Task Force (FATF).[63]

In its role as the UK Financial Intelligence Unit, the ECU establishes extended communication streams both with the Money Laundering Reporting Officers, and various national bodies competent for issues such as fraud prevention. The acknowledgment of the vital role of feedback to financial institutions for the effective functioning of an anti-laundering system, led to the creation during 1997-98 by the ECU of 'an electronic bulletin board on the European Police Information Centre (Epi-Centre) Bulletin Board System', enabling MLROs to browse an on-

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Intelligence Unit; and the Branch Support Unit. On a detailed structure of the NCIS,see Appendix B in NCIS, *Annual Report 1997-1998.*

[63] NCIS, *op. cit.*, p.20.

line library of information related to money laundering and the system of disclosures.[64] This step has been complemented by the installation of a new computer database, which holds records of all the disclosures made to NCIS and contains links to other intelligence databases and which has the ability to receive financial disclosures electronically, undertake database searches automatically and disseminate data, and provide improved strategic and operational analysis.[65] On the other hand, the ECU also contributes to the Financial Fraud Information Network (FFIN) chaired by the Bank of England, offering a forum for City regulators and law enforcement agencies to discuss these matters.[66]

The communication networks between various units of different nature, along with the increasing computerisation of intelligence have led to serious concerns about phenomena such as the matching of data with information, in whole or part, included in a series of public and private databases. In the context of fraud prevention, such concerns were recently raised by the Data Protection Registrar,[67] stating that:

'Exercises of this sort (data matching) raise privacy concerns in that although the majority of applicants for benefits, goods or services are honest and there is no prior indication of any wrongdoing on their part, data relating to them is to be shared and scrutinised by a range of other organisations. This loss of privacy has led some commentators to warn of the capacity of data matching exercises to reverse the normal rules of evidence and the presumption of innocence and to raise fears of the use of computer technology to conduct mass surveillance of the population'.[68]

The Registrar went on to call, in view of the growing interagency co-operation in collecting data aimed at fraud prevention, for any databases developed for criminal intelligence purposes to be operated to 'at least the standard required by the Association of Chief Police Officers' Code of Practice on Data Protection'.[69]

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[64] NCIS, *op. cit.*, p.21.
[65] NCIS, Annual Report *1998/99*, p.21.
[66] NCIS, *Annual Report 1996/97*, text downloaded from www.ncis.co.uk
[67] The Data protection Act 1998 changed the title into Data Protection Commissioner.
[68] Data Protection Registry, Specialist Paper, Beating Fraud is Everyone's Business, downloaded at www.open.gov.uk/dpr/fraud.html
[69] *Ibid.*

Similar concerns are accentuated by the adoption of laws such as the recent Security Administration (Fraud) Act 1996, which allows the matching of tax and immigration records with claims for social security, housing and other welfare benefits.[70] In the context of money laundering intelligence sharing, significant developments are to be expected as a result of the implementation in 1998/99 of a new ECU computer database enabling the unit to receive financial disclosures electronically and to disseminate them to law enforcement by secure electronic communications, allowing also for the undertaking of improved strategic analysis.[71]

The adoption of the Data Protection Act 1998, implementing the 1995 EC Data Protection Directive,[72] does little to alleviate these concerns. Section 29 of the Act stipulates a broad exemption from its principles for crime and taxation purposes, namely:

a. the prevention and detection of crime
b. the apprehension or prosecution of offenders, and
c. the assessment or collection of any tax or duty or of any imposition of a similar nature.

Bearing in mind the widely defined ambit of NCIS and the policing nature of the ECU as the UK Financial Intelligence Unit, it seems highly improbable that its functions will not fall within the 'crime' exemption of the Act. This is notwithstanding the narrowing of the scope of the exemption by the Data Protection Commissioner, proclaiming that 'for any of these three exemptions to apply, there would have to be a substantial chance rather than a mere risk that in a particular case the [crime and taxation] purposes would be noticeably damaged'.[73]

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[70] M. Maguire (1998), 'Restraining Big Brother? The Regulation of Surveillance in England and Wales', in C. Norris, J.Moran and G.Armstrong (eds.), *Surveillance, Closed Circuit Television and Social Control*, Ashgate, Aldershot, Brookfield USA, Singapore, Sidney, p.233.
[71] NCIS, 1997/98, p.21.
[72] For an extended analysis, see part 4B below.
[73] Commentary on the Data Protection Act, chapter 5, downloaded from www.open.gov.uk/dpr/chpt5.htm

Similar issues of control and accountability arise from the Police Act 1997. In spite of strong Parliamentary opposition, asking for the addition to the NCIS task of gathering, storing and analysing information in order to provide criminal intelligence of the rider 'for the prevention and detection of crime', the final text does not include any specification of the kind.[74] This creates a considerable inconsistency in the framework of the relations of NCIS with the National Crime Squad (NCS), which was also been established by the Police Act and is entrusted with the main function is 'to prevent and detect serious crime'.[75] Along with issues of co-ordination and competence at the national level, the catch-all powers of NCIS raise a series of concerns due to the fact that NCIS is the liaison body for the purposes of the Schengen and Europol Conventions, which limit intelligence exchange to cases of serious or extremely serious offences.[76]

Notwithstanding the aforementioned ambiguities, and problems related to its every day function,[77] the UK anti-money laundering system has been highly praised in the FATF mutual evaluation, which stated that NCIS has an important role in this system and that 'it is important that it has the human and technological resources which are necessary for it to operate effectively'.[78] The obvious advantages of a police FIU system, which functions on a 'low-cost', 'low-bureaucracy' basis[79] and facilitates the gathering, exchange and analysis of

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[74] See Uglow and Telford, *op. cit.*, p. 13.
[75] Section 48(2).
[76] Article 2(1) of the Europol Convention and 8(2)(a) of the Schengen Convention. See Uglow and Telford, op. cit.
[77] On problems related to the work of Money Laundering Reporting Officers, in particular concerning compliance, training and legislation awareness, see R. Bosworth-Davies (1997), 'Living with the Law: A Survey of Money laundering Reporting Officers and their Attitudes towards the Money –Laundering Regulations' in Journal of Money Laundering Control, vol.1, no.3, pp.245-254. As regards the policing aspect, the Association of Chief Police Officers Crime Committee highlighted in 1995 the following problems: the increased volume of disclosures outstripping the ability of forces to be effective; the difference in dealing with disclosures between police forces; the low prioritisation of disclosures; the lack of management information in forces; and the lack of feedback to disclosing institutions. The Committee called further for a model structure for a police unit dealing with financial disclosures. See ACPO Crime Committee-Joint Working Group on Financial Disclosures, 'Financial Disclosures'.
[78] FATF Annual Report 1996/97, paragraph 47.
[79] On this point see Council of Europe, European Committee on Crime Problems (CDPC), Committee of Experts in Criminal Law and Criminological Aspects of Organised Crime, *Money*

information within a specialised police framework functioning to a great extent beyond data protection guarantees, have led other EU countries to adopt a similar model. Of great interest in this respect is the case of Finland, where the Act on Preventing and Clearing Money Laundering (68/98),[80] replaced the pre-existing system of suspicious transaction reports being made to the financial supervision authority (FSA), by the creation of a Money Laundering Clearing House, assuming the role of a Financial Intelligence Unit.[81] The transition from a system of reports to the Financial Services Authority to a body within the National Bureau of Investigation was greeted with enthusiasm by both authorities, as it was acknowledged that the task of 'clearing' money laundering reports was too burdensome for a financial supervision body.[82] The removal of a 'buffer zone' was also approved by banks and the Finnish Bankers Association.[83] The concerns regarding the 'police' nature of the Clearing House are confronted with an express limitation of its right to record, use and disclose information 'only for the purposes of preventing and clearing money laundering'. The reports are recorded in a personal data file intended for the use of a police unit referred to in section 7 of the Police Personal Data File Act, with access permitted only to the Clearing House personnel.[84]

Laundering: Counter-measures in the United Kingdom, (author: M. Levi), DOC. PC-CO (97)14, restricted, Strasbourg, 23.6.1997, p.5.

[80] For a version of the Act in English, see (1998) *Commercial Laws of Europe*, vol.1, pp.537-544.

[81] Section 4 of the Act reads as follows: For conducting the duties relating to the clearing of money laundering, there is the Money Laundering Clearing House, hereafter the Clearing House, established at the National Bureau of Investigation. It is also a duty of the Clearing House to promote co-operation between various authorities in prevention of money laundering as well as promote co-operation and exchange of information with authorities of foreign States and international organizations responsible for clearing money laundering. The National Bureau of Investigation shall give annual reports on the activities of the Clearing House and on the progress of anti-money-laundering activities in general to the Ministry responsible for police functions. (Unofficial translation). Note that the unit is referred to as 'Centre for investigation of money laundering' in the C.L.E. translation.

[82] Personal communications with: Mr. M. Ryymin, Director, Money Laundering Clearing House, Helsinki, 18.3.1998; and Ms. T. Nevalainen, Banking Supervisor, Financial Supervision Authority, Helsinki, 25.3.1998.

[83] Personal communication with Mr. Reijo Lahde, Senior Management Head of Security, and Mr. Juhani Saarento, Chief of Security, Finnish Bankers Association, Helsinki, 24.3.1998.

C. The Judicial Model: Luxembourg (with notes on Portugal)

Luxembourg has adopted a mixed model in 'filtering' suspicious transaction reports, touching upon both the police and the judiciary. The country's financial intelligence unit is the 'Money Laundering Service' (Service Anti-Blanchiment), situated in the Public Prosecution Office (PPO), to which suspicious transaction reports are made.[85] The PPO is a judicial criminal authority which, 'aside from its role of handling suspect transaction declarations, has legal authority to identify and prosecute offences'.[86]

The *Service Anti-Blanchiment*, like its aforementioned counterparts, is bound by the principles of confidentiality and international co-operation. The latter is facilitated by the new Article 26(2) of the Code of Criminal Procedure which states that the Prosecutor 'may communicate information on money laundering activities to authorities of another State responsible for detecting or prosecuting acts of money laundering'. In terms of confidentiality, Article 4 of the Regulation of 6 January 1995 authorises the PPO to set up and operate a data bank on suspect transactions, stipulating that 'recorded, processed details can only be accessed by members of the Public Prosecution Office and cannot be communicated to third parties'.[87]

However, even this limitation has the potential to go beyond the strict 'for the purposes of combating money laundering' barrier of confidentiality, bearing in mind the diversity of the Public Prosecutor's tasks. This concern is reinforced by the perceived conflict between the Prosecutor's role as judicial criminal authority with the imposed 'speciality rule' restricting the use of information obtained solely to countering money laundering and drug trafficking. The speciality rule is

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[84] Section 12 of Act 68/98 and Set of Regulations and Rules given by the Ministry of the Interior (Unofficial translation), point 6.2.2.
[85] Act of 5.4.1993.
[86] Public Prosecution Office of the Luxembourg District Court, Annual Report of the Service Anti-Blanchiment 1997, p.5.
[87] *Ibid.*

undermined however by the power of the Prosecutor to use information for prosecuting all related, appropriate offences.[88]

The success of the Luxembourg model, based on the trust placed in judicial authorities,[89] is sought by combining the facilities on information access and analysis that the police model provides, combined with the speed of action both in receiving suspicions and prosecuting offences that the judicial authorities offer. This is also reflected in the choice by Portugal to place relevant institutions under an obligation to report suspicious transactions to the 'competent judicial authority',[90] thus reflecting the multiple functions of the Public Prosecutor related to penal action or the representation of State in the judiciary.[91] On the other hand, the human rights concerns connected with the invasiveness of the police model appear here as well, but at a different level: as judicial authorities are closely associated with investigative and prosecutorial functions, it is possible that financial intelligence will be used by them for a variety of purposes beyond 'filtering' and analysis. In such cases, the boundaries between 'filtering' of information, pre-trial investigation and prosecution may appear to be blurred.

III. An Attempt at Synthesis

In view of the recent establishment of financial intelligence units in most of the EU countries, it would be premature to draw definitive conclusions on their function in a systematic manner. The annual reports of all units mentioned in the above analysis pride themselves on the increasing number of received reports from credit

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[88] *Ibid.*

[89] According to Thony, preference for the judicial system is rooted in the special nature of the functions of the Public Prosecutor's Office, the constitutional guarantees of independence and the public confidence enjoyed by these authorities. Thony, op. cit., p.267/1044 respectively.

[90] Decree-Law 313/93, article 10.

[91] On an overview of the Portuguese framework against drugs, see M. P. Machado (1999), 'Portugal', in N. Dorn (ed.), *Regulating European Drug Problems. Administrative Measures and Civil Law in the Control of Drug Trafficking, Nuisance and Use*, Kluwer Law International, the Hague, London, Boston, pp. 227 et seq.

and financial institutions.[92] Furthermore, and notwithstanding the considerable diversity between the nature of units in different States, they all possess extended powers of information gathering, analysis and communication.

Such developments pose acute challenges in view of the uneveness in the legal regulation of the units concerned. It can be discerned from the analysis that options such as the Dutch one in favour of an extensive legal framework consisting of a multitude of wide ranging statutes coexist with systems like the United Kingdom, where with the exception of a framework statute on the National Criminal Intelligence Service, there is no specific statutory provision on the extent of the powers of the Economic Crimes Unit. These differences, which can be attributed to factors such as diversity in legal cultures and lack of harmonisation in the field, raise important issues with regard to international co-operation between units at the bilateral and EU level, having the potential to undermine effective co-operation on the one hand and the protection of individuals from this highly invasive legal framework on the other.

3. INTERNATIONAL CO-OPERATION

I. MEMORANDA OF UNDERSTANDING (MoUs)

The need for international co-operation between financial intelligence units has been addressed, as seen in the previous section, by the insertion of provisions at the national level which enable the exchange of information with units of other countries exercising similar duties.[93] These channels of co-operation are formalised

[92] With the exception of United Kingdom and Finland, where, after a steep increase in the reports in the first years of the units' function the number has been fluctuating the past three or four years (until 1998), the number of reports to the rest of the units has been constantly increasing. According to a recent press release by the Dutch Ministry of Justice, the number of reports received by MOT rose from 16,974 in 1997 to 19,303 in 1998, largely due to the flow of reports concerning unusual money transfers, a new form of disclosure which came into effect on 1 August 1998. Press release of 26.4.1999, downloaded from http://www.minjust.nl/

[93] See for instance the provisions of Dutch law, part 2(I)(a) above.

by the conclusion of Memoranda of Understanding (MoUs) between financial intelligence units at the bilateral level.[94] Notwithstanding the impetus of MoUs for the sharing of information between FIUs, their harmonious functioning is hindered by a series of factors. Apart from the controversial legal nature of MoUs in international law[95], such factors are:

-. The considerable differences relating to the legal nature of FIUs. It is extremely difficult for an independent or administrative unit to share information with a unit that constitutes part of the police of another State. Such an exchange, without sufficient guarantees, would undermine one of the fundamental missions of independent units, that is to avoid to the greatest possible degree the communication of sensitive every day information to law enforcement authorities. On the other hand, independent units face problems in consulting foreign police data, as they 'do not fit' in the international police communication system;[96] at the same time, it is impossible sometimes even unconstitutional for many police units, as State units to exchange information with independent, 'non-state' bodies in other countries.[97]

-. Differences concerning the reporting systems, influencing the nature of the work of the units. An eloquent example is the case of MOT and CTIF/CFI in Belgium, both independent units.[98] While the considerable obstacles imposed by differences in the nature of the units are avoided here, there is a fundamental difference between the reporting of unusual transactions in the Dutch system, with the

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[94] On the possibilities of bilateral information exchange between units of EU Member States, see Annex 7 of Second Commission Report, *op. cit.* The Report distinguishes between general and limited possibility of information exchange, with the general option being categorised into exchange for intelligence purposes (units in Italy, Portugal and Sweden) and exchange for intelligence and criminal investigation or prosecution purposes (units in Belgium, France, Netherlands, Spain and the United Kingdom).

[95] For an extensive analysis, see A. Aust (1986),'The Theory and Practice of Informal International Instruments', in *International and Comparative Law Quarterly*, vol.35, pp.787-812.

[96] B. Verhelst, 'The Organisation of a Financial Intelligence Unit', unpublished paper for the MERCOSUR Seminar on Money Laundering, Buenos Aires, 26-28 May 1998.

[97] Such unconstitutionality problems, in particular in the case of Germany, were highlighted by the Deputy Director of CTIF/CFI, the Belgian FIU, Mr. B. Verhelst, personal communication, Brussels, 23.6.1998.

[98] CTIF/CFI, established by the law of 11.1.1993, is characterised as an 'independent administrative authority with legal personality', placed under the supervision of the Ministers of Justice and Finance and headed by a magistrate or her deputy detailed from the Public Prosecutor's Office. CTIF/CFI, Excerpts from the 3rd Annual Report, 1995/1996, p.8.

reporting of suspicious transactions in Belgium. While the work of MOT focuses on assessing whether an unusual transaction is suspicious, the personnel of CTIF/CFI have the task to determine the predicate offence prior to reporting the case further.[99]

-. Differences in the definition of the money laundering offence, in particular relating to the predicate offences. Notwithstanding the tendency towards the inclusion of proceeds from 'all serious crime' in the offence,[100] considerable differences still exist in the definition of money laundering. Hence, while for some units the offence is related to the proceeds of all serious crimes, others work with a specific list of offences, with particular issues arising in cases such as tax evasion. Even in the case of extensive harmonisation, problems still exist relating to the definition of predicate offences, such as organised crime, in different jurisdictions.

II. THE EGMONT GROUP

The first attempt to address the complex issues emanating from the establishment of financial intelligence units at the international level took place at the Egmont-Arenberg Palace in Brussels. There, on June 9, 1995, representatives of 24 nations and 8 international organisations established an informal organisation known as the Egmont Group.[101] The goals of the group are twofold:[102] to improve the functioning of the units at the national level, by supporting the expansion and systematisation of financial information exchange and the improvement of personnel skills; and to improve international co-operation between FIUs, anticipating that 'the organizations represented in the Egmont Group will work together to become the first nodes in an expanding international communication network for sharing information on money laundering and financial crime'.[103]

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[99] B. Verhelst, personal communication, *op. cit.*
[100] See the Second Commission Report, *op. cit.* See also MOT, *Annual Report 1999*, p.34.
[101] S. Morris, foreword, in unpublished manuscript on the Egmont Group (date not given).
[102] V. Schmoll, 'Information Paper on 'Financial Intelligence Units', unpublished manuscript, 10.7.1997.
[103] Morris, *op. cit.*

The cornerstone in the work of the Egmont Group is the adoption of a common definition of Financial Intelligence Unit, adopted at the plenary meeting in Rome in November 1996 and perceiving as a FIU:

' A central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information

(i) concerning suspected proceeds of crime, or

(ii) required by national legislation or regulation

in order to counter money laundering'.

It has been noted that the definition 'was meant to be specific enough to describe these apparently distinct agencies from other types of government authorities, yet it had to be generic enough to include the many variations as found in the countries establishing such units'.[104] It is further evident that the definition is broad enough to encompass all types or models of FIUs (independent, administrative, police, judicial) and aims to serve as a standard 'against which newly forming units are being measured'.[105]

The adherence to this FIU definition was reaffirmed by the Egmont Group Statement of Purpose, adopted in Madrid, on 24.7.1997. The Statement further prioritised, *inter alia*, the 'determination of appropriate consequences that attend to an Egmont Group Participant's status with respect to the definition of FIU adopted in Rome' and the 'articulation of more formal procedures by which decisions as to particular agencies' status *vis-à-vis* the FIU definition are to be taken'. Such prioritisation reflects what has been deemed as a series of 'important existential issues' for the Egmont Group: the development of procedures for recognising

[104] Schmoll, *op. cit.*
[105] *Ibid.*

agencies as meeting the Group FIU definition;[106] and the examination of the consequences of such designation.[107]

The procedural part is planned through the submission of a completed questionnaire to the Egmont Legal Working Group (LWG), empowered with recommending or not the candidate FIU to the meeting of the FIU heads where the final decision is made. With respect to the 'substantive' aspect, the LWG reached the conclusion that the Group should focus on the 'benefits' of recognition rather than potential negative consequences. These benefits are as follows:

a. FIUs are the decision-makers within the Egmont Group;
b. FIUs participate in the activities of the working groups;
c. FIUs have access to the Egmont Secure Web; and
d. FIUs may participate in the Egmont Group sponsored training (such as operational workshops).[108]

The establishment of the Egmont Secure Web is of particular interest here. It is a 'secure website with FIU information, relevant laws and regulations, and general analytical information, all of which would be shared by and [be] accessible to FIUs', permitting them also to communicate in this environment.[109] Access to the Secure Web, which is endorsed by the Egmont Group Statement of Purpose, is restricted to Egmont recognised FIUs. This is in order to ensure that 'all those units connected to the site have some common or shared responsibility for the information contained in it and for information exchanged through the secure e-mail system'.[110]

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[106] As of 24.7.1997, 28 operational units were found to meet the Egmont definition, with some 25 other being in the planning or development stage.
[107] The Egmont Group (Chairmen of the Egmont Working Groups), 'Memorandum- Egmont Group of Financial Intelligence Units'. Subject: Issues discussed in the Working Group Meetings since Madrid (Ljubljana, 27-28.10.1997 and Amsterdam, 11-12 March 1998), unpublished manuscript.
[108] *Ibid.*
[109] The Egmont Group, 'Report on the Third Conference', San Francisco, 22-23 April 1996.

III. THE UNITED NATIONS

The information exchange aspect of the fight against money laundering was highlighted by the United Nations in 1990: then, the Global Programme of Action, focusing on drug money laundering, [...] called for the Division of Narcotic Drugs, in cooperation with the Customs Cooperation Council and Interpol to 'promote bilateral or regional exchanges of information between governmental regulatory or investigative agencies concerning the financial flow of illicit drug proceeds'.

The establishment of FIUs in many jurisdictions and the work of the Egmont Group had as a consequence the intensification of UN calls for information exchange. In the preparations for the 20th Special Session of the UN General Assembly on countering the drug problem, it was recognised that the effective fight against money laundering is possible 'only through international cooperation and the establishment of bilateral and multilateral information networks such as the Egmont Group, which will enable States to exchange information between competent authorities'.[111] The formal acknowledgment of the work of the Egmont Group was reflected in the UN Action Plan against money laundering, adopted in New York on 10.6.1998, which called for the implementation of law enforcement measures to provide tools for, *inter alia*, information-sharing mechanisms.[112] The UN Global Programme against money laundering (1997-99), implemented by the Office for Drug Control and Crime Prevention (ODCCP), calls on the other hand for technical cooperation, consisting *inter alia* of transfer of know-how for the establishment of FIUs.

However, no UN initiative reflects the move towards the establishment of FIUs in a more clear-cut manner than the 1995 UN Model Law on 'Money Laundering,

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[110] The Egmont Group, 'Memorandum', *op. cit.*
[111] Economic and Social Council (1997), 'Countering Money Laundering', Doc. E/CN.7/1998/PC/5, 22.10.1997.
[112] Principle c(iii).

Confiscation and International Cooperation in relation to Drugs'.[113] The first variant of provisions on the reporting procedure establishes in Article 15 a ' drug money laundering control service' which shall receive the reports from financial organisations. The Article leaves open the legal form of the unit, which is deemed as a 'purpose-made agency, an intermediary between the world of justice and the world of finance', with the sole task being to 'help financial organizations clarify the suspicions aroused by questionable transactions and to assist the work of the judicial authorities by providing them with dossiers containing substantiated financial analyses'.[114]

The Model law is complemented by a Model decree 'on the Drug Money Laundering Control Service', applying Article 15 of the law. Along with modalities related to the composition and duties of the personnel and their communication with the financial sector, the decree contains a specific reference to the analysis of reports. The latter shall be analysed by the unit on the basis of the information at its disposal. The unit shall also gather 'any additional information that may help to establish the origin of the funds or the nature of the transactions referred to in the reports' from the financial institutions, as well as from administrations involved in combating illicit drug trafficking.[115]

In a similar, but more precise, vein the 1998 UN Model Money Laundering and Proceeds of Crime Bill[116], drafted for common law jurisdictions, contains a provision establishing an 'anti-money laundering authority'. According to Article 11(2), the authority:

a. shall receive reports of suspicious transactions;

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[113] United Nations, International Drug Control Programme, Legal Advisory Programme, November1995.

[114] Introduction to the Model law, p.12. Article 14 of this variant, referring to non-financial entities under an obligation to report, provides for the communication of reports to the authorities competent to institute criminal proceedings. The second variant (Articles 14 and 15) provides for all reports to reach the aforementioned authorities.

[115] Article 3.

[116] Downloaded from www.imolin.org/poc98.htm.

b. shall send any report to the appropriate law enforcement authorities, if having considered the report, it also has reasonable grounds to suspect that the transaction is suspicious;
c. may enter the premises of any financial institution or cash dealer to inspect records, ask related questions, make notes and take copies of the whole or part of the records;
d. shall send to the appropriate law enforcement authorities, any information derived from the 11(2)(c) inspection, if it gives reasonable grounds to suspect that a transaction involves proceeds of crime;
e. may instruct any financial institution or cash dealer to take such steps as may be appropriate to facilitate any investigation anticipated by the authority;
f. may compile statistics and records, disseminate information within the state or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Minister of Finance;
g. shall create training requirements and provide record-keeping and transaction reporting training to financial institutions;
h. may consult with any relevant person, institution or organisation for the purpose of exercising its powers or duties under subsections 2(e),(f) or (g); and
i. shall not conduct any investigation into money laundering, other than for the purpose of ensuring compliance by a financial institution with the provisions of this Part.

The use of the term FIU and the need for the establishment of such units is further reflected in the draft UN Convention against Transnational Organised Crime.[117] Article 4bis, entitled 'measures to combat money laundering', contains a paragraph stating that:

> ' States Parties should enhance their ability to exchange information collected pursuant to this article. This shall, where possible, include measures to enhance domestic and international exchange of information between law enforcement and regulatory authorities. Towards this end, States Parties should consider the establishment of financial intelligence units to serve as

[117] CICP/CONV/WP19. Unofficial text, provided for information purposes only.

national centres for the collection, analysis and dissemination of information regarding potential money laundering and other financial crimes'.[118]

4. THE EUROPEAN UNION

I. THE LEGAL FRAMEWORK

As mentioned above,[119] the EC money laundering directive did not contain any express provision on the establishment and functioning of financial intelligence units. The need for a co-ordinated approach on the matter was however addressed in the first Commission's report on the implementation of the directive, where calls were made for 'the establishment of Central Reporting Units by all the Member States, the setting up of procedures to permit the exchange of information among these Units... and the enhancement of cooperation among Member States' judicial, police, customs and other competent authorities'. [120]

Steps towards such cooperation have been attempted through a series of third pillar measures. The Convention 'on the use of information technology for customs purposes'[121] provides for direct access to data included in the EU Customs Information System, apart from national customs administrations, to 'other authorities competent, according to the laws, regulations or procedures of the Member State in question, to act in order to achieve the aim stated in Article

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[118] 4bis (4). The impetus towards the formalisation of financial intelligence units is also reflected in regional efforts to counter money laundering. Hence, the Commonwealth Model law for the Prohibition of Money Laundering contains a part specifically devoted to the appointment, powers and duties of a Money Laundering Authority, responsible for receiving and filtering reports by financial institutions. The principal anti-money laundering instrument of the Inter-American Drug Abuse Control Commission (CICAD), its Model money laundering regulations, on the other hand, were revised in 1997 to include a specific provision on financial intelligence units. Article 8bis, entitled 'financial (intelligence/investigation/information/analysis) units, calls at the CICAD Member States to establish 'a central agency responsible for receiving, analyzing and disseminating to the competent authorities, disclosures of information relating to financial transactions that are required to be reported pursuant to these Model Regulations'.

[119] See part 2 above.

[120] COM(95)54 final, Brussels 3.3.1995, p.14.

[121] OJ C316, 27.11.1995, p.34.

2(2)'.[122] This aim is broad enough to include assistance in 'preventing, investigating and prosecuting serious contraventions of national laws', and is narrowed to the extent that the Convention applies only to drug money laundering.[123] A significant extension of its scope is however expected after the adoption by the Council of an additional Protocol to the Convention, aiming at broadening the scope of money laundering, strengthening the fight against organised crime.[124]

Another decisive step was taken by the Second Protocol of the Convention on the protection of the EC financial interests.[125] The Convention, which applies only to money laundering related to proceeds of fraud – at least in serious cases- and of active and passive corruption,[126] calls, along with the criminalisation of money laundering,[127] for cooperation of the competent authorities in the Member States with the Commission 'so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering'.[128] Notwithstanding the vague wording of the provision, it has been used by the Commission as a possible legal basis for the exchange of information between financial intelligence units at EU level.[129] Although no specific reference to anti-money laundering authorities is made, it was felt that the provision could perhaps be used to overcome the difficulties of including a provision on FIUs in a first pillar instrument such as the money laundering directive.[130] This does not however appear to be the case in the recent Commission draft amending the 1991 directive, which contains only a provision on the exchange of information between

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[122] Article 7(1).
[123] Article 1(1)(b).
[124] See *International Enforcement Law Reporter*, vol.15, issue 4, April 1999, p.167.
[125] OJ no. C221, 19.7.1997, p.12.
[126] Article 1(e).
[127] Article 2.
[128] Article 7(2).
[129] Second Commission report, *op. cit.*, p.16.
[130] The inclusion of an FIU provision in an amended draft money laundering directive (to be issued by autumn 1999), and the attribution thus of an EC competence on the issue is still a matter of controversy and one of the major problems of the Commission's legal team. Mr. A.B. Beverly, Head, Commission DG 15, personal communication, (e-mail), 6.5.1999.

financial intelligence units and the Commission.[131] Major issues thus continue to arise with regard to the channeling of money laundering information to the multitude of EU fraud databases.[132]

Similar developments in inter-agency co-operation may arise on the basis of the conclusions of the G7 Finance Ministers and the representative of the Commission at their meeting in London on 8.5.1998, calling for international action to enhance the capacity of anti- money laundering systems to deal effectively with tax related crimes. Such action shall further the following objectives: the extension of suspicious transactions reporting to money laundering related to tax offences; and the power to money laundering authorities to the greatest extent possible to pass information to their tax authorities to support the investigation of tax related crimes, and the communication of such information to other jurisdictions in ways which would allow its use by their tax authorities.[133] In spite of the difficulties surrounding the regulation of taxation matters at the EC/EU level, it is not unlikely that consideration will be given for similar measures within the ambit of the Justice and Home Affairs pillar.

Major impetus towards the establishment of information exchange channels in the European Union is given by the Council Action Plan to combat organized crime.[134] It is asserted there that the Union and its Member States must be 'totally rigorous...in ensuring the maximum level of cooperation and two-way information exchange between its financial and fiscal institutions and its law enforcement and

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[131] Commission of the European Communities (1999), Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, COM (1999)352 final, 99/0152(COD), Brussels, 14.7.1999. See in article 1 the new article 12(2). For an extensive analysis, see part 5.

[132] For an overview of the EU anti-fraud intelligence framework, see: W. A. Tupman (1998), 'Supranational Investigation after Amsterdam, The *Corpus Juris* and Agenda 2000', in *Information and Communications Technology Law*, vol.7, no.2, pp.85-102; and U. Sieber (1998), 'Euro-Fraud: Organised Fraud against the Financial Interests of the European Union', in *Crime, Law and Social Change*, vol.30, pp.1-42.

[133] Point 16.

[134] OJ no C251, 15.8.1997, p.1.

judicial authorities'.[135] One of the Plan's recommendations calls for the setting up of a system for exchanging information concerning 'suspected' money laundering at the European level, in conformity with the relevant data protection rules.[136] To that end, a feasibility study into an EU-wide system of information exchange for combating money laundering has been conducted.[137] The recommendations of the study favour the establishment of an EU-wide computerised data exchange system for the detection of money laundering criminal actions, whereby 'subject- oriented information is exchanged by means of a reference index'; and calls for a study into 'the desired (basic) contents of the reference index and which could apply to suspect transactions regarding criminal money flows of subjects which can be matched to available information relevant for investigation departments'.[138] Further study was recommended on the desirability of a separate legal basis for the data exchange system, examining whether this is feasible within the Europol framework, and on the provision of data protection guarantees.[139]

In this regard, a possible legal basis for the establishment of an EU-wide money laundering data exchange system is provided by the Treaty of Amsterdam and its revamped Justice and Home Affairs pillar. New Article 30 (ex K.2), provides for common action in the field of police cooperation, including 'the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports of suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data'.[140] Article 34 (ex K.6) provides for measures to be

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[135] Point 6g.
[136] Recommendation 26(a).
[137] See Doc. 6050/97, LIMITE, ENFOPOL 33, Brussels, 19.2.1997; Doc. 6277/2/97, REV2 LIMITE, ENFOPOL 39, Brussels, 18.4.1997; Doc. 10539/97, LIMITE, ENFOPOL 179, Brussels, 10.9.1997.
[138] Doc. 6050/97, op. cit. According to the same document, three types of computerised systems of information exchange were examined in the study: option 1 puts forward a database in which much data is recorded and from where the Member States can draw freely; option 2, preferred by the majority of the respondents, favours a reference index with very limited personal data, whereby the system indicates which country can be contacted in case of a 'hit'; and option 3 proposes a combination of 1 and 2, running from a reference index with several entered data to a database generously filled with information.
[139] *Ibid.*
[140] Article 30(1)(b)

taken in the legal form of: common positions defining the EU approach to a particular matter,[141] framework decisions for the purpose of approximation of the laws and regulations of the Member States,[142] decisions for any other purpose consistent with the objectives of the Title, excluding approximation,[143] or conventions to be adopted in accordance with the constitutional requirements of the Member States.[144]

In all the above mentioned initiatives related to the exchange of money laundering information, Europol plays a pivotal role. Recognised by the Maastricht EU Treaty[145] and officially operational since October 1998, the European Police Office (Europol) has a wide ambit of action delineated by the Europol Convention.[146] Article 2(1) states as its objective to improve the effectiveness and cooperation of the competent authorities in the Member States in eliminating and combating terrorism, unlawful drug trafficking and other serious forms of international crime when there is an organised crime and a transnational crime element in the case. The third paragraph of the same Article provides Europol with competence in respect of 'illegal money laundering activities in connection with these forms of crime and specific manifestations thereof'.

Article 3 further states the principal tasks of Europol. According to its first paragraph, these are:

a. to facilitate the exchange of information between the Member States;

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[141] Article 34(2)(a)

[142] Article 34(2)(b), providing that such decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods and that they shall not entail direct effect.

[143] Article 34(2)(c), providing that these decisions shall be binding and not entail direct effect.

[144] Article 34(2)(d).

[145] Article K(1)(9), providing for police cooperation between the Member States 'for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol).

[146] OJ no. C 316, 27.11.1995, p.1. Europol replaced the European Drugs Unit (EDU), which was granted a legal basis under Article K.3(2) of the Maastricht Treaty through a 1995 Joint Action (OJ L62, 20.3.1995, p.1).

b. to obtain, collate and analyse information and intelligence;[147]
c. to notify the competent authorities of the Member States without delay via the national units referred to in Article 4 of information concerning them and of any connections between criminal offences;
d. to aid investigations in the Member States by forwarding all relevant information to the national units; and
e. to maintain a computerized system of collected information containing data in accordance with Articles 8, 10 and 11.

Paragraph 2 provides for the development of specialist investigative knowledge, the provision of strategic intelligence and the preparation of reports, while paragraph 3 provides for assistance to the Member States.

These powers have been enhanced by the Amsterdam EU Treaty, granting Europol operational powers.[148] The second paragraph of new Article 30 (ex K.2); calls on the Council, within a period of five years after the date of entry into force of the Treaty, to:

a. enable Europol to facilitate and support the preparation and to encourage the co-ordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity;
b. adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime;

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[147] According to the Europol Rules applicable to analysis files (Europol 10), analysis means the 'assembly, processing or utilisation of data with the aim of helping a criminal investigation (in accordance with Article 10(2) of the Convention)', while processing of personal data means 'any operation or set of operations which is performed on personal data, whether or not by automated means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'. The text of Europol 10 can be found in: House of Lords, Select Committee on the European Communities, 'Europol: Confidentiality Regulations', HL Paper 9, Session 1997-98, 1st Report, 17.6.1997.

[148] On a discussion-prediction, see A. Klip (1997), 'Europol, Who is Watching You?', in H. Meijers *et al.* (Standing Committee of experts in international immigration, refugee and criminal law),

c. promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol;
d. establish a research, documentation and statistical network on cross-border crime.

The powers of Europol are thus far-reaching, both in respect to access to a wide range of data and in respect to their processing and analysis. Regarding money laundering information, concerns are raised by the inclusion in the Europol information system of data relating not only to persons who are suspected of committing or taking part in an offence within the ambit of Europol, but also of persons 'who there are serious grounds under national law for believing will commit criminal offences'.[149] These concerns become acute bearing in mind that the communication channels between financial intelligence units and the National Europol Liaison Units and Officers, responsible for providing information to Europol under Articles 4 and 5 of the Convention, can be quite extended in practice.[150]

This is particularly the case in systems like that of the United Kingdom, where both the Europol National Unit and the FIU are within the National Criminal Intelligence Service.[151] The tensions surrounding such issues are further highlighted when discussed within the framework of the protection of data, fundamental rights and issues of accountability and justiciability.

Democracy, Migrants and Police in the European Union: the 1996 IGC and Beyond, FORUM, Utrecht, pp. 61-72.

[149] Article 8(1)(1)(2).

[150] According to J. Storbeck, then coordinator of the European Drugs Unit, Liaison Officers have access to extensive national databases, intelligence and sensitive data. The national databases contain 'the results of law enforcement investigations and other information such as data on offenders and offender groups, addresses, telephone numbers, suspicious acts, and other data pertaining to drug-related crime and other forms of organized crime', with some of it being 'soft' information, 'which has yet to be verified and requires further assessment before it can be used for police purposes'. J. Storbeck (1997), 'Coordinating the Flow of European Intelligence: Europol's Accountability Mechanisms', in M. den Boer (ed.), *Undercover Policing and Accountability from an International Perspective*, EIPA, Maastricht, p.119.

II. THE CHALLENGES FOR HUMAN RIGHTS

As has been demonstrated, the effectiveness of anti-money laundering legislation is based on the provision, communication, analysis and processing of information on an increasing number of every day transactions with a wide range of financial and non-financial entities. Such legislation can be thus quite invasive, not only due to the great number, diversity and every day character of the information provided, but also due to their 'journey' through a complicated inter-agency network of bodies entrusted with a wide array of powers of analysis, processing and 'matching' with other categories of data. This part of the analysis will focus on the challenges that these networks pose for fundamental human rights, such as the right to privacy and the right to a fair trial, at the European Union level, examining whether the existing EC/EU measures offer appropriate guarantees.

A. The EC data protection directives

The cornerstone of the EC data protection legal framework is Directive 95/46 of the European Parliament and the Council 'on the protection of individuals with regard to the processing of personal data and on the free movement of such data',[152] which has since been complemented by the Directive on data processing and the protection of privacy in the telecommunications sector.[153] The data protection directive serves the two-fold aim to protect natural persons' fundamental rights, in particular privacy, with respect to personal data processing, while at the same time eliminating prohibitions to the free flow of data connected with this kind of protection.[154] To this end, the directive-which applies to automated data and to manual data only if the latter form,or intend to form, part of

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[151] NCIS Report, *op. cit.*
[152] OJ L281, 23.11.1995, p.31.
[153] OJ L24, 30.1.1998, p.1.
[154] Article 1.

a filing system[155]- contains a series of provisions on, *inter alia*, the lawfulness of processing of personal data, judicial remedies, liability and sanctions and transfer of personal data to third countries.[156] Some of its principles, in particular those relating to lawful processing, are also adopted by the more specialised telecommunications directive.[157] The Committee on Legal Affairs and Citizens' Rights of the European Parliament recently made explicit reference to both texts, maintaining that 'wherever fighting money laundering implies the collection of personal data, the right to privacy must be protected by a full and correct application of Directives 95/46/EC and 97/66/EC.'[158]

However, such protection is limited by a series of exceptions to the scope of the directives. Article 3(2) of the data protection directive expressly stipulates that it shall not apply to the processing of personal data:
'in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.'
In addition, Member States may restrict many of the obligations and rights related to the lawful processing of data when this is a necessary measure to safeguard, *inter alia*

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[155] Article 3(1).
[156] An extensive analysis of the directive provisions falls outside the scope of this paper. For an extensive analysis of various aspects of the law, see inter alia: I. Vassilaki (1994), 'The Constitutional Background of Privacy Protection within the European Communities', in *Revue Européenne du Droit Public*,vol.6, no.1 pp.109-130; S. Simitis (1995), 'From the Market to the Polis: The EU Directive on the Protection of Personal Data', in *Iowa Law Review*, vol.80, part 3, pp.445-469; C.J. Bennett (1998),'Convergence Revisited: Toward a Global Policy for the Protection of Personal Data?', in P.E. Agre and M. Rotenberg, *Technology and Privacy: The New Landscape*, MIT Press, Cambridge,MA and London, pp.99-123; G. Pearce and N. Patten (1998),'Achieving Personal Data Protection in the European Union', in *Journal of Common Market Studies*, vol.36, no.4, pp.529-547.
[157] See Article 14.
[158] Motion for a Resolution, Resolution on the 'Second Commission Report to the European Parliament and the Council on the Implementation of the Money Laundering Directive', point 5, in Doc. A4-0093/99, 26.2.1999.

-. Public security

-. The prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions

-. An important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters.[159]

The applicability of the data protection directives to the processing of money laundering information is thus far from clear. Beginning with the first stage of information gathering and analysis, still within the reporting institutions, it could be argued that the directives are applicable, since the identification and reporting duties are imposed by the EC money laundering directive, a Community, first pillar measure. This interpretation is reinforced by the Preamble of the data protection directive, stating that the exceptions to its scope are 'without prejudice to the obligations incumbent upon Member States under Article 56(2), Article 57 or Article 100a of the EC Treaty',[160] the two latter forming also[161] the legal basis of the money laundering directive. However, it is still not evident how the balance will be struck between the 'Single Market' objective of the money laundering directive with its aim of combating crime. Even if the Article 3 exception is surpassed, the crime prevention exception to fundamental provisions of the data protection directives seems difficult to avoid.

The situation becomes even more complex at the stage where information has reached financial intelligence units. Although the Commission asserted that the money laundering directive implicitly contained a legal basis for their creation,[162] there is no explicit EC law reference to their establishment and functions, which falls largely outside the scope of Community law. The Commission's further assessment that a legal basis is offered by the third pillar Second fraud protocol,[163]

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[159] Article 13(1)(c),(d) and (e). Both provisions are repeated in almost identical wording in the telecommunications directive: see Articles 1(3) and 14(1); the latter does not contain a reference to the interests of Member States or the European Union.
[160] Preamble, thirteenth recital.
[161] 57(2) and 100a.
[162] Commission Second Report, op. cit., p.13.
[163] See above, part 4a.

seemingly excludes an explicit EC competence. Even in the case of overstretching the realm of the money laundering directive to embrace the work of FIUs, further issues will be raised due to the diversity of the legal nature of the units in the various Member States. Unlike the Commission proposal,[164] the data protection directive does not include specifically public sector bodies, with the public/private distinction being completely removed in the final text.[165] This lack of distinction alleviates the unevenness between independent units on the one hand, and police/judicial units, which are more linked with the State, on the other. At the same time however, one cannot but focus on the data protection directive's adoption of a 'purpose' or 'activities', rather than of a 'nature', criterion in order to establish exceptions to its ambit. In this light, FIUs are unlikely to escape the 'criminal law' exception of the directives.

Similar lacunae are encountered in the exchange of information sphere at the EU level. The Second fraud protocol refers explicitly to the observation with regard to data processing of 'a level of protection equivalent to the level of protection set out in Directive 95/46/EC'.[166] However, this provision refers only to the Commission, and not to the competent national authorities exchanging information. The protection is also potentially weakened by the exception relating to the safeguarding of an important 'economic and financial interest', particularly the case with fraud against the European Union. Data protection at the EC level, notwithstanding the third pillar nature of the measure, is ensured by the granting of jurisdiction to the European Court of Justice, albeit only in disputes between Member States, or the latter and the Commission, and subject to a series of limitations.[167]

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[164] Commission proposal, OJ C277, 5.11.1990, p.3, article 3.
[165] Bennett, op. cit., pp.106-107. Simitis criticises the Council for their refusal 'to share the Commission's policy to aspire to a regulation based on the close connection between the data subjects' fundamental rights and the use of their data irrespective of whether Community law is still applicable'. *Op. cit.*,p.455.
[166] Article 8.
[167] See Article 13 of the Protocol.

In this context, the fraud protocol is the only third pillar text with a direct reference to the data protection directive. The CIS Convention,[168] along with specific provisions related to the use of data only for Convention purposes and the right to access, contains a reference to data protection at a level 'at least equal' to that resulting from the principles of the 1981 Council of Europe data protection Convention.[169] The Action Plan to combat organised crime, on the other hand, refers vaguely to money laundering information exchange in conformity with the 'relevant rules relating to data protection'.[170]

B. The Council of Europe initiatives, with emphasis on the European Convention on Human Rights

The Council of Europe has promulgated specialised data protection legislation, in the form of the 1981 Convention for the protection of individuals with regard to automatic processing of personal data.[171] The Convention has been ratified by all EU Member States[172] and provides an extensive basis for legislative harmonisation on data protection standards. It contains a series of basic principles for data protection and calls for well-established principles of protection, such as fairness and lawfulness in processing and lawfulness and proportionality in storage.[173] However, the impact of the Convention is limited by its restriction to automated data and its wide range of exceptions, covering *inter alia* the protection of 'State security, public safety, the monetary interests of the State or the suppression of criminal offences'.[174] Notwithstanding the broader reference to criminal law purposes, the discussion on the exceptions to the data protection directive can be extended here.

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[168] Convention on the use of information technology for customs purposes, see part 4a above.
[169] Article 13(1).
[170] Recommendation 26(a).
[171] European Treaty Series-No.108.
[172] The last one being Italy, on 1.7.1997.
[173] Article 5.
[174] Article 9(2)(a).

In this context, interesting interpretative guidance is provided by the Council of Europe Recommendation 87(15) regulating the use of personal data in the police sector. The Recommendation, which reiterates to a great extent the principles of the 1981 Convention, states that 'regardless of nomenclature, the principles should apply to any body with police functions involved in the collection, storage, use and transfer of personal data' for the purposes set out in it.[175] A further point of interest is the exception permitting the communication of data to public as well as private bodies *inter alia* if it is necessary so as to prevent *a serious and imminent danger.* [176] The extent to which financial intelligence units fall within the scope of the Recommendation and the fight against money laundering can be equated with the prevention of a serious and imminent danger is debatable and a pivotal issue meriting judicial, if not express statutory, intervention.

Both the Convention and the Recommendation constitute intergovernmental initiatives, outside the scope of Community or EU law, unless expressly stipulated by EU legislation. They can, however, have an indirect influence on the law of the European Union, as their principles are taken into account in the development of the interpretation of the European Convention of Human Rights.[177] Article 8 of the latter, establishes a right to respect privacy, stating that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a

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[175] Explanatory Memorandum, paragraph 23, cited in: W. Bruggeman (1998), 'Data Protection Issues in Interinstitutional Information Exchange: The Case of Criminal and Administrative Intelligence', in M. den Boer (ed.), *Schengen's Final Days? The Incorporation of Schengen into the New TEU, External Borders and Information Systems*, EIPA, Maastricht, p.120.

[176] Emphasis added. Principles 5.2 and 5.3 of the Recommendation. For a detailed analysis, see Bruggeman, op. cit., pp.125-128.

[177] The following comment by the former president of the European Court of Human Rights, Mr. Ryssdal, is indicative: 'For our part, we in Strasbourg should not ignore the basic principles laid down in the Data Protection Convention in addressing ourselves to those issues which do come before us. Those basic principles are a sectoral implementation of Article 8 of the European Convention on Human Rights in the context of automatic data processing and may therefore [be employed] in aid in interpreting that provision'. Cited in L.A. Bygrave (1998), 'Data Protection Pursuant to the Right to Privacy in Human Rights Treaties', in *International Journal of Law and Information Technology*, vol.6, no.3, p.256.

democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

The applicability of this provision to the law of the European Union is, however, contested. Commenting on the Convention in general, the Committee on Civil Liberties and Internal Affairs of the European Parliament, recently took the view that 'it is clear that a European public order composed by the Convention rules and the case-law developed by the Strasbourg Court must impose itself in the European Union'.[178] This view however comes to balance the fact that there is no express incorporation of the Convention in the EU Treaty, and neither has the Union yet incorporated an equivalent bill of rights. The Maastricht Treaty on European Union introduced a provision on the respect of fundamental human rights as guaranteed by the European Convention of Human Rights and resulting from the constitutional traditions of the Member States as general principles of Community law.[179] This protection has been enhanced in the Amsterdam Treaty by the assertion that one of the Union's founding principles is the respect for human rights and fundamental freedoms,[180] and the European Court of Justice has declared their observance.[181] However, human rights protection remains piecemeal: no comprehensive bill of rights has been included in the Treaty; according to the Court, accession to the Strasbourg Convention falls at the moment outside Community competence; and the protection of rights is limited to the provisions and boundaries of EC and not EU law.[182]

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[178] *'doit s'imposer'*. In 'Rapport sur le Plan d'action du Conseil et de la Commission concernant les modalites optimales de mise en oeuvre des dispositions du Traite d'Amsterdam relatives a l'etablissement d'un espace de liberte, de securite et de justice', Doc. A4-0133/99/PARTIE A, 18.3.1999, p.24.

[179] Article F (2).

[180] Article 6(1) (ex F).

[181] See the leading *Nold* case, 4/73, (1974) E.C.R. 491.

[182] An extensive analysis of the protection of human rights by the European Union falls outside the scope of this paper. From the plethora of extensive overviews, see: P. Twomey (1994), 'The European Union: Three Pillars without a Human Rights Foundation', in D. O'Keefe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, London: Chancery. For a post-Amsterdam analysis, see P. Alston and J.H.H. Weiler (1998),'An 'Ever Closer Union' in Need of a Human

Even in the case of maximum observance of the Convention by the European Union, the extent of the protection afforded by Article 8 is questionable. This is mainly due to the wide range of exceptions to its scope.[183] The European Court of Human Rights has so far accepted as justified exceptions cases of, *inter alia*, secret surveillance of telephone calls in the interests of national security and public safety;[184] information collection and secret dossier maintenance on candidates for employment in sensitive jobs in view of national security threats;[185] and the monitoring of telephone communications by the police, being in accordance with the law and 'aiming at the prevention of crime, undoubtedly necessary in a democratic society'.[186]

It is interesting to see how the crime prevention aspect in the exchange and processing of money laundering information will be balanced with the privacy considerations of Article 8. This is especially the case with the establishment and networking of Financial Intelligence Units, as some of them-as in the case of the United Kingdom- at the national level, and co-operation at the international level may fall foul of the 'in accordance with the law' condition of 8(2). In the stage of information collection from the banking industry, an important test for data protection is currently evolving in Sweden. There, the Country Administrative Court, in a judgment of 28.11.1996, upheld a decision by the Swedish Data

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Rights Policy', in *European Journal of International Law*, vol.9, pp.658-723. On the Opinion by the European Court of Justice on the lack of Community competence to accede to the European Convention of Human Rights ,(1996) ECR I-1759, see the note by G. Gaja (1996), in *Common Market Law Review*, vol.33, pp.973-989.

[183] For an extensive analysis see D.J. Harris, M. O'Boyle and C. Warbrick (1995) *Law of the European Convention on Human Rights*, Butterworths, London, Edinburgh, Dublin, pp.335-353. On the scope of Article 8 more broadly, see D. Feldman (1997), 'The Developing Scope of Article 8 of the European Convention on Human Rights', in *European Human Rights Law Review*, vol.3, pp.265-274. And Bygrave, *op. cit.*, pp.247-284.

[184] Case *Klass v. FRG*, (1978) A 28.

[185] Case *Leander v. Sweden* (1987) A 116.

[186] Case *Lüdi v. Switzerland* (1991) (17/1991/269/340), A238. The Court did not take the same approach in a case of undercover policing in Portugal, where there was no Court permission and it was held that the police officers 'exercised an influence such as to incite the commission of the offence'. The Court asserted that there was a violation of the 'fair trial' Article 6(1) of the Convention and considered unnecessary to consider the applicant's Article 8 claim. Case *Teixeira de Castro v. Portugal*, found in European Court of Human Rights homepage, www.dhcour.coe.fr/

Supervisory Board (DSB), rejecting a joint application from six major banks for permission to keep 'a special central computer-based personal register consisting of information regarding individuals who have been reported to the financial crimes authorities for suspected violation of the Swedish Money Laundering Act'.[187] The banks, supported by the Financial Supervisory Board, argued that such a data base was necessary for the fulfillment of the extensive duties imposed by the money laundering legislation. The Court however, taking into account the 'exceptional cases' restrictions to the Swedish Data Act, balanced the conflicting interests in favour of 'personal integrity'.[188]

Privacy considerations are not the only ones at stake in money laundering information exchange. Further concerns in the context of the European Convention of Human Rights are raised regarding the right to a fair trial, established by Article 6. A facet of this right lies in the interrelated principles of the presumption of innocence and defence rights.[189] In the context of money laundering investigations, the emphasis on data concerning 'suspicious' transactions- potentially extending, through various channels of communication and matching techniques- to 'suspicious' individuals raises major issues regarding the presumption of innocence. The *rationale* behind the 'tipping-off' duty of reporting institutions on the other hand- consisting of not informing the money laundering suspect of the existence of a report/investigation- raises additional concerns with regard to defence rights.

Defence rights, centering on the rationale that the accused is informed and able to present her objections from the beginning of the process, including investigation,[190] were recently challenged in a case before English courts. The Court of Appeal had to judge on a conflict created by an Economic Crimes Unit

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[187] Case *Nordbanken AB(publ.) and others v. Swedish State*. See note by J. Bryme, (1997)2 *CTLR*, pp.T 43-44, at p.43.
[188] *Ibid*, at p.44.
[189] See C. Teitgen-Colly (1996), 'Fair Trial Guarantees and Administrative Enforcement', in M. Delmas-Marty, M. Summers and G. Mongin, *What Kind of Criminal Policy for Europe?*, Kluwer, London, pp.281-301, at pp.296-297.
[190] Case *Sanchez-Reisse v. Switzerland*, 1986, A 107. See also Teitgen-Colly, *op. cit.*

investigation between the State interest in combating crime and a series of rights and principles concerning private parties and their trial position. The latter consisted in: the entitlement of a private body to obtain redress from the courts; the principle that justice should be administered in public, that a party should know the case which was being advanced by another party and should have the opportunity to reply; and the principle that a party who came before the courts was entitled to know the reasons for the courts' decisions.[191]

The guidance given by the Court was based on the premise that those principles, designed to protect the interests of the individual, could not always be paramount. The Court then went to give NCIS a great array of powers at the stage when a party to legal proceedings intended to apply or had obtained an order for discovery or disclosure of information by the financial institution involved. NCIS should then be informed and given the opportunity to identify the material which it did not wish to be disclosed and indicate any preference as to haw the handling of an order or an application should be handled. The Court then went on to suggest partial disclosure. If the latter is not accepted by the applicant, then the directions of the Court should be sought. The Court was rather vague in outlining such directions, saying that both to inform the applicant on the reason of reference to the court and to involve her in an open trial 'would depend on the circumstances'. The Court then, in an attempt to safeguard, even at that last stage, a minimum standard of defence rights, called for the need to comply with the ordinary trial principles to the extent that that was possible and imposed on NCIS the burden of proof of the need for non-disclosure.[192]

C. The Europol Convention

In terms of data protection, Article 14 the Europol Convention contains a reference to both the 1981 Council of Europe Convention and Recommendation (87)15.

[191] Case *C v. S and others*, (1999) 2 *All ER*, pp.343-351. For an analysis from the perspective of the financial institutions' duties, see chapter 6.
[192] *Ibid*, pp.349-350.

There are however considerable divergencies in the application of these measures: while Member States shall take the necessary measures in relation to data processing to ensure a standard of protection 'which at least corresponds' to the Council of Europe standards,[193] Europol shall only 'take into account' those standards in the collection, processing and untilization of personal data.[194] At the same time, problems are created by the fact that both Council of Europe instruments cover only automated data, leaving the processing and exchange of non-automated data unregulated.[195]

Moreover, the Convention departs from these provisions in various instances. Hence Article 10 permits the collection, storage and processing of sensitive data in Article 6 of the 1981 Convention[196] where it is strictly necessary for the purposes of the file concerned and such data supplement other personal data already entered in that file.[197] According to the Council of Europe instrument, the automatic processing of such data is prohibited 'unless domestic law provides appropriate safeguards'[198] and unless it falls under one of the Article 9 exceptions.[199] In a similar vein, Article 10(1) of the Europol Convention, allowing the collection, processing and use of data in order to achieve the Office's broad objective as delineated in Article 2(1),[200] is more extensive than principle 2.1 of the Police Data recommendation, allowing data collection where this is 'necessary for the

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[193] Article 14(1).
[194] Article 14(3).
[195] Klip, *op. cit.*, p.66.
[196] Article 6 states as special categories of data those revealing racial origin, political opinions or religious or other beliefs, personal data concerning health or sexual life and data relating to criminal convictions.
[197] Similar problems in relation to sensitive data arise from the Europol rules applicable to analysis files. Article 5(2), rather than establishing a general prohibition on storage unless sensitive data supplement other information and are 'absolutely necessary', it is left open to Europol to specify that sensitive data are 'strictly necessary' for the purpose of analysis work. The scope is extended also to non-suspect categories of victims, contacts, associates and informers. According to the human rights organisation JUSTICE, this new wording is more permissive than both the Council of Europe data protection instruments. See Memorandum from JUSTICE, in *House of Lords, Select Committee on the European Communities*, op. cit., p.24.
[198] Article 6.
[199] The aforementioned public order-criminal law ones are complemented by exceptions relating the protection of the data subject or the rights and freedoms of others.
[200] See part 4a above.

prevention of real danger or the suppression of a specific criminal offence'.[201] Such concerns grow in the light of the limited mechanisms of judicial control and accountability of Europol.[202]

III. CURRENT DEVELOPMENTS

Following the increased pressure towards the establishment of an EU-wide system of exchange of information on suspicious transactions, the recent initiative of the Republic of Finland in view of the adoption of a Council Decision concerning arrangements for cooperation between financial intelligence units of the EU member states in respect of exchanging information is of particular significance.[203] Article 1 of the draft decision sets out its general principle, which is that financial intelligence units shall cooperate to assemble, analyse and investigate relevant information, adding in paragraph 2 that cooperation shall take place in the form of the exchange of a wide range of information.[204] Such exchange may take place: either spontaneously or upon request; and either on the basis of this Decision or on the basis of existing or future memoranda of understanding. These co-operation mechanisms are complemented by the observance by FIUs of the member state obligations regarding the Europol Convention.[205]

In line with the principle of cooperation which is being put forward in article 1, the draft decision contains two important definitional attempts at EU level. First of all, article 2, in an almost identical wording to that of the Egmont Group initiative, establishes a definition of a financial intelligence unit as:

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[201] Klip, *op. cit.*, p.67.
[202] On the lack of EU judicial and parliamentary control, see inter alia: Klip, op. cit.; Walker (1998),'European Policing and the Politics of Regulation' in P.J. Cullen and W.C. Gilmore (eds.), *Crime Sans Frontières: International and European Legal Approaches*, Edinburgh University Press, Edinburgh, p.141; European Parliament, Committee on Civil Liberties and Internal Affairs, *Proposal for a Recommendation on Europol: Reinforcing Parliamentary Controls and Extending Powers* Rapporteur: H. Nassauer, Doc. A4-0064/99, 23.2.1999.
[203] OJ C362, 16.12.1999, p.6.
[204] The provision refers to 'any available information that may be relevant to the processing or analysis of information or to investigation by the FIU regarding financial transactions related to money laundering and the natural and legal persons involved'.
[205] Article 8.

'A central, national agency which in order to combat money laundering is responsible for receiving and to the extent permitted, requesting, analysing and disseminating to the competent authorities, disclosures of financial information concerning suspected proceeds of crime and required by national legislation or regulation'.

Exercising a parallel function, article 3 calls on member states to ensure that the performance of the functions of the units under the decision 'shall not be affected by their internal structures, *regardless of whether they are administrative, law enforcement or judicial authorities'*. [206]

The draft decision contains an attempt to counter-balance this impetus towards cooperation, which is also enhanced by provisions aiming at eliminating bureaucratic
obstacles,[207] by including a series of data protection clauses. Article 5 thus provides that:

1. Information or documents obtained under the provisions of this Decision may only be used for the purposes of processing and analysing data within FIUs.
2. The use of information or documents referred to in paragraph 1 for criminal investigations or prosecutions shall be subject to the prior consent of the FIU which submitted the information or documents in question.
3. FIUs shall undertake all necessary measures, including security measures to ensure that the information submitted under this Decision is not accessible by any other authorities, agencies or departments.

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[206] Emphasis added.
[207] Article 4 (2) provides that, when a request for information is made in accordance with the Decision, information shall be provided without the need for a formal letter of request under applicable conventions or agreements between member states. Article 6(1) on the other hand establishes a spontaneous mechanism of co-operation by providing that FIUs may, within the limits of the applicable national law and without a request to that effect, exchange relevant information.

4. The information submitted will be protected by at least the same rules of confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU.
5. The requesting FIU shall comply with any conditions on the use of information laid down by the requested FIU.

It is evident that the protection offered by these provisions is *information-centred*, rather than *human-centred*. The safeguards put forward by article 5 serve primarily the goal of facilitating the exchange of information, by prioritising the sensitivities and demands of the unit which provides the information, especially in paragraph 5. Paragraphs 1 and 3 are welcome reiterations of the principle set out in the money laundering directive that the information provided must be used only for money laundering purposes. A significant inroad into these guarantees is however the possibility of the use of such information, according to paragraph 2, in criminal investigations or prosecutions. The danger of data provided to an independent or administrative unit being used in a criminal investigation in another country is prominent and the discretion of the requested unit to allow such use places it under an important public policy role. Finally paragraph 4 constitutes an attempt to provide a minimum standard of data protection. This provision adds little to the effective and harmonised protection of information in this respect, as it is strictly confined to largely divergent national standards. The adoption of standards applicable to FIUs has the potential to broaden, rather than minimise, such discrepancies, in view of the considerable differences in the nature of FIUs in different member states. The absence of any sort of reference to the EC data protection directive or the relevant Council of Europe Convention is striking.

The reluctance to establish a consistent EU, if not EC-wide data protection framework in the field of information exchange for money laundering purposes is also evident in another parallel development in the field, this time at the EC-level. Article 12(2) of the new Commission draft amending the EC money laundering

directive provides, as seen above,[208] for the exchange of information on suspicious transactions between financial intelligence units, and potentially bar associations and self-regulatory professional bodies,[209] and the Commission. Such co-operation is established only in cases of fraud, corruption or 'any illegal activity damaging or likely to damage the European Communities' financial interests' and has a far-reaching potential of multiplying the exchange of data. In this respect, particular concerns arise regarding the ambiguities surrounding the nature, function and role of the Commission under this provision and the extension of control and accountability in this respect. These concerns remain acute in view of the vague reference of the draft that the exchanged information shall be covered by 'rules of professional secrecy'. As no further specification is given in this respect, it is hoped that the provision will raise, along with EC competence issues, considerable reactions during the reading of the draft by the institutions.

5. CONCLUSION

The journey of financial information for the purposes of combating money laundering goes through various levels of communication and analysis: national and supranational, private and public, in the regulatory sphere or within the policing realm.[210] It can thus be asserted that the anti-money laundering information exchange mechanisms constitute prominent examples of the emergence of what has been deemed 'transnational policing networks'.[211] The development of these networks is marked by two features: the increasing number

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[208] Part 4A.

[209] The latter may, according to amended article 6, be designated as authorities competent to receive suspicious transaction reports by legal professionals included in the extended scope of the draft directive. For an extensive analysis, see chapter 5.

[210] On the interface between administrative and criminal measures in the EU fight against drugs, see N. Dorn and S. White (1999), 'Drug Trafficking, Nuisance and Use: Opportunities for a Regulatory Space', in N. Dorn (ed.), *op. cit.*, pp.263-289; see also N. Dorn (1998), 'Les Nouvelles Formes de Renseignement Policier', in *Les Cahiers de la Securité Interieure*, vol.32, pp.137-150.

[211] B. Hebenton and T. Thomas (1998), 'Transnational Policing Networks', in *International Journal of Risk, Security and Crime Prevention*, pp.99-110. See also D. Bigo (1996), *Polices en Réseaux. L'Éxperience Européenne*, Presses de Sciences Politiques, Paris. On the term of 'transnational policing', see J.W.E. Sheptycki (1995), 'Transnational Policing and the Makings of a Postmodern State', in *The British Journal of Criminology,* vol.35, no.4, pp.613-635.

and diversity of every day information gathered and analysed; and the creation of new institutions with increased policing powers in this respect.

The concerns relating to data protection and wider human rights issues emanating from such policing structures are manifold. Notwithstanding the attempt in various EU Member States to provide Financial Intelligence Units with a solid legal basis, a great number of aspects of their function remain unregulated. Vivid examples are issues related to the powers of the units, such as data matching; their communication with other public and private channels of information at the national level; and their communication structures with institutions in other countries and in the European Union. These issues are exacerbated by the lack of uniformity regarding the nature and functions of financial intelligence units in the EU member states. The existing models form a colorful mosaic of different attitudes towards information gathering and exchange, which seem, at least in certain instances, difficult to reconcile. The changes in models in a number of member states do not reflect any common tendency towards the adoption of one model. On the contrary, they have been rather contradictory reflecting national cultural, political and legal particularities, as well as practical considerations.[212] The situation may become more complex by the inclusion in the remit of financial intelligence units of institutions as diverse as bar associations and self-regulatory professional bodies, as envisaged by the new Commission draft amending the EC money laundering directive.

Similar *lacunae* exist in the analogous EU structures, characterised by fragmentation and diversity in scope and guarantees. The move of the EU towards

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[212] In Finland, for instance, the role of the financial intelligence unit has been transferred from the Financial Supervision Authority to a body within the National Bureau of Investigation (part 2 II). In sharp contrast, in Italy the system changed and suspicious transactions, which used to be reported to the local Head of Police (*Questore*), are now, according to Decree No. 153/1997, reproted to the Italian Foreign Exchange Office (*Ufficio Italiano Cambi*-UIC), a public law institution endowed with legal personality and independent management. See C. Zaccagnini (1998), 'Italy: Suspicious Transaction Reporting: Recent Developments in Legislation' in *Journal of Money Laundering Control*, vol.2, no.2, pp.181-185; and A. Jamieson (2000), *The Antimafia. Italy's Fight against Organized Crime*, Macmillan, Houndmills, Basingstoke and London and St Martin's Press, New

the adoption of a decision on information exchange between FIUs is not accompanied by a comprehensive attempt to address the issues arising from the diverse nature of the units and fails to provide adequate data protection guarantees. The proposed involvement, under the EC pillar, of the Commission in information exchange is at the moment equally ambiguous and raises a series of issues regarding the interaction of EC, EU and national measures in the field. Such concerns are accentuated in the light of the limited scope of protection offered by the EC data protection directive and the ambivalent attitude of the European Union toward the protection of human rights and the status of third pillar measures. This is especially the case in the post-Amsterdam landscape where third pillar police cooperation is enhanced and even the EC pillar provides for the adoption of police cooperation measures for the prevention and combating of crime.[213]

York, pp.118-119. See also the unpublished and undated paper by and entitled 'Italian Foreign Exchanges Office- Ufficio Italiano dei Cambi (U.I.C.).

[213] See Article 61 (ex 73I of the Treaty). Similar concerns have been put forward by the European Commission, calling for special attention to the respect of privacy and data protection in particular, especially when, 'in support of the development of police and judicial cooperation in criminal matters, data exchange networks are set up'. Commission Communication, 'Towards an Area of Freedom, Security and Justice', COM (1998) 459 final, Brussels, 14.7.1998, p.5.

CONCLUDING REMARKS

The evolution of money laundering counter-measures in the European Union was the outcome of a process of securitisation which has marked international policy discourse since the mid-1980's. In the course of this process, which is a clear example of the reconcepualisation of traditional state/military models of security, money laundering was perceived as a manifold transnational threat: Through its association with transnational organised crime, it was perceived to threaten interests ranging from human life to the social fabric *per se* and state stability and sovereignty. The use of credit and financial institutions for money laundering purposes on the other hand, added to these categories the threat to the soundness and stability of the financial system as a whole. The perception of money laundering as a multifaceted and imminent threat led to a series of calls at the international level for the adoption of appropriate counter-measures as emergency measures to counter this threat. Such initiatives reflected a two-fold strategy of prevention and control, in combining regulatory measures aiming at the co-operation of the financial system with criminal law and law enforcement ones.

In line with the international consensus regarding the need for the adoption of money laundering counter-measures, the European Community adopted in 1991 directive 91/308 'on prevention of the use of the financial system for the purpose of money laundering'.[1] Its adoption, shortly after the launch of influential international initiatives, signified the establishment of the European Community as a *transnational security actor* in the field of money laundering. At the stage of European integration at the time, the legitimacy of the Community assuming this role was however highly contested: the directive was adopted prior to the entry into force of the Maastricht Treaty, which introduced for the first time a EU- and still not EC – competence regarding issues related to international crime.

[1] OJ L166, 28.6.1991, p.77.

This legitimacy deficit did not stop the Community including in the directive, which was adopted on the basis of freedom of movement and internal market considerations, which fell within Community competence, both regulatory and, beyond that, substantially criminal law provisions. This process does justice to the argument that the effective functioning of the market is used as a new legal concept attempting to 'legitimise the concept of 'European Criminal Law''.[2] The directive provisions were complemented by subsequent EU third pillar and national implementing measures in areas falling outside EC competence but closely related to the fulfillment of the directive mandate. In this manner the EU anti-money laundering framework constitutes *the first comprehensive paradigm of security governance* in the field in the international arena. This paradigm is based on three main pillars: *criminalisation*; *responsibilisation*; and the centrality of the *administration of knowledge*. All three reflect new tendencies emanating from the character of money laundering counter-measures as emergency measures and pose significant challenges to fundamental legal principles.

The trend towards *criminalisation* is linked with the increase of the punishability level through the creation of a number of new criminal offences. The *money laundering offence*, which was introduced through a combination of legal and political means at the EC level, represents an eloquent example in this respect. Money laundering is an ancillary offence, punishing conduct which occurs *after* the commission of a primary harm offence. The trend, unlike the similar offence of receiving, to punish own funds money laundering renders the offence draconian and creates an obvious and dangerous tension with the *ne bis in idem* principle. The *actus reus* of the offence is over-extended to cover ordinary and to a great extent legitimate every day behaviour; far from providing legal certainty, the catch-all wording of the provisions on the other hand may cover behaviour which is not even remotely connected to the predicate offence. In the light of such a broad *actus reus*, the tendency to extend the offence to negligent behaviour raises a series of concerns, in having the potential to undermine the principle of the dependence

[2] P.-A. Albrecht and S. Braum (1999), 'Deficiencies in the Development of European Criminal

of criminal liability on guilt. Similar concerns arise in relation to the attribution of liability to legal persons. From the procedural point of view, the presumption of innocence is threatened by the tendency to reverse the burden of proof so that knowledge or suspicion of money laundering is proven by the defendant.

In the case of *responsibilisation*, the challenges to the law are coupled with challenges to well-established social relations. Credit and financial institutions are placed under extensive duties of data gathering and proactive co-operation with the national authorities responsible for combating money laundering. This sits uneasily with well-established principles of professional secrecy and more general duties of care towards the customer, leading potentially to the breach of the right to fair trial. At the same time the duties result in an invasion, especially through the collection of a broad range of information on ordinary transactions in order to establish suspicion, of the private sphere. In this manner, the legislation signifies a sharp change in the structure of every day human relationships: the enhanced bond of trust emanating from the special relationship between a credit institution and their customers is loosened in order for the institutions concerned to become active partners with the state in the fight against crime.

The responsibilisation duties give rise to the need for the *administration of knowledge* related to financial transactions. The flow of an increased quantity of information on every day behaviour in the form of suspicious transaction reports led to the establishment, at national level, of new instances of security governance supplementing those of the state. These are the financial intelligence units, which are specialised agencies responsible for the gathering and analysis of such data. These agencies have been established within a very short period of time in all EU member states and are entrusted with a wide range of powers to collect, analyse and disseminate information, coupled with an extended right to communicate and request information from private and public institutions. In many cases, these powers are not clearly delimited by law and data protection guarantees are not

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Law' in *European Law Journal*, vol.5, no.3, pp.304-306.

expressly provided. The situation is not ameliorated by the push for international co-operation between these units, in view of their different legal nature and structure, which signifies different levels of regulation and data protection.

The challenges posed by this tripartite paradigm to fundamental legal principles are multiplied in view of two interrelated factors: the calls for the extension of the scope of money laundering counter-measures; and their development within the constantly evolving process of European integration. In the field of *criminalisation*, pressure has been directed towards the extension of the money laundering offence on an 'all crimes' basis. The money laundering directive, which provides for a minimum standard of drug trafficking predicates, is currently being revised in view of subsequent first and third pillar developments to include organised crime, fraud and corruption. The offence has also been redefined by subsequent third pillar measures adopted for very specific and yet diverging purposes. Member state implementation on the other hand varies, ranging from an 'all crimes' offence to the laundering of proceeds of specific crimes. This mosaic of definitions does little for the achievement of legal certainty, especially in view of the inclusion in the definition of the legally – and conceptually- elusive and all-embracing concept of organised crime.

The situation is similar regarding *responsibilisation* measures as to the extension of the legislation. A further amendment to the directive aims at extending its scope to a wide range of professions and individuals, including sensitive sectors such as the legal profession. This development has the potential of bringing an end to social relations of trust as we know them, challenging at the same time fundamental principles such as legal confidentiality, which are intrinsically related to fair trial rights. The extension of the scope is problematic here in view of the fact that the directive duties remain amorphous, with no specific protective provisions for the customer in cases of wrongful disclosure. Regarding the mechanisms responsible for the *administration of knowledge*, pressure towards EU-wide co-operation has led to the following paradox: financial intelligence units

of considerably different status are called, on the basis of a post-Amsterdam proposed third pillar measure, to exchange information *regardless of their nature.* More room for developments exists on the basis of article 30(1)(b) (ex K.2) of the Amsterdam Treaty the specific reference to common action in police co-operation on the administration, in particular through Europol, of suspicious transaction reports. Legal certainty and potentially data protection interests are thus undermined in the name of international co-operation.

The justification of the expanding EU anti-money laundering framework and its prevalence over the legal principles at stake are still, nearly a decade after the adoption of directive 91/308, far from clear-cut. The emotive securitisation discourse which served to ensure the legitimacy of the measures was not followed by any credible measurement of the scale of the problem. Estimates of sums of laundered money were put forward only recently, are still too vague, and have been strongly criticised.[3] On the other hand, the adverse macroeconomic impact of money laundering is still not directly ascertained. The attempt to justify money laundering counter-measures even on the basis of limited concrete data is evident in the following passage of a Report adopted by the Commission of the European Communities as recently as 1998:

> 'It is concluded that although difficult to measure, the magnitude of the sums involved and the extent of the criminal activities that generate [criminal] income have implications for both the domestic and the international allocation of resources and macroeconomic stability. Although, the IMF reports, there is currently no theoretical literature on the macroeconomic effects of money laundering, indirect macro-based empirical research and related studies of crime and the underground economy, coupled with the pervasive role of

[3] According to the International Monetary Fund, the aggregate size of money laundering in the world could be 'somewhere between two and five percent of the world's gross domestic product': FATF/OECD Policy Brief, *Money Laundering*, July 1999. A criticism of such an approach, and of the over-reliance on numerical statistics in measuring the size of organised crime and money laundering is found in Law Commission of Canada (1999), *Major Issues Relating to Organized Crime: within the Context of Economic Relationships* (prepared by M.E. Beare and R.T. Naylor), pp.7-8.

money laundering in illegal activity, suggest that money laundering may be sufficiently widespread to exert an independent impact on the macroeconomy'.[4]

Another contested issue in the 'balancing act' between money laundering counter-measures and the legal principles they challenge is the delimitation of the actual interests that are threatened by the money laundering phenomenon. All relevant international initiatives, including the directive, equate the threat of money laundering with that of organised crime. It is clear however that the phenomena are not identical, but bear a relationship of a means to an end: money laundering results in *facilitating* the work of criminals, rather than attacking the interests threatened by organised crime *per se*. Money laundering counter-measures must thus be balanced as protecting only in an indirect way the interests which are perceived to be threatened by organised crime. The perception of money laundering as a direct security threat may be substantiated only with reference to the sound functioning of the financial system. This interest however cannot be elevated to the same status with interests protected by the criminal law and the constitution, such as the maintenance of human life or state organisation.

These considerations must be taken into account in order to 'de-securitise' to a certain extent the money laundering phenomenon. This process is essential in order to place limits to the challenges posed by EU money laundering counter-measures, which are constantly being extended both materially, to cover broader categories of offences, people and policing structures, and territorially, to apply for instance in Eastern European countries, which are trying to consolidate the same legal principles that are being challenged here. From the perspective of legislative drafting, efforts in this respect must focus on the achievement of the highest level of legal certainty and respect for fundamental legal principles: the money laundering offence must be strictly delimited and the extension to negligent laundering rejected; guarantees must be provided for the protection of the special

[4] Commission of the European Communities (1998), *Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive*, COM (1998) final, Brussels, 1.7.1998, p. 18. On an overview of the potential, according to the International Monetary Fund, macroeconomic effects of money laundering see chapter 3.

relationship of trust in every day transactions, in particular between lawyers and their clients; and more extensive and harmonised legislation must be adopted placing the action and networking structures of financial intelligence units under clear-cut guarantees of data protection and accountability.

The quest for legal certainty and respect for fundamental legal principles is particularly needed in view of the current stage of European integration, which is marked by the evolution of the Union to an area of 'freedom, security and justice'. The constitutionalisation of security, which is viewed as one of the central objectives of the Union, may lead to pressure for the adoption of a multitude of measures in the fields of money laundering and organised crime, under both the first and third pillars. The imposition of such security logic in money laundering counter-measures can be dangerous, if a parallel protection of fundamental legal principles is not achieved at EU level. In this context, the drafting of a Charter of Fundamental Rights within the Treaty, which currently includes specific rights of data protection and privacy,[5] must be welcomed. However, if effective protection is to be achieved, constitutionalisation in the law of the European Union must be extended to expressly provide and protect fundamental legal principles which are challenged by the drive towards more 'security'.

[5] Draft Charter of Fundamental Rights of the European Union, DOC. CHARTE 4102/00, CONTRIB 2, Brussels, 6 January 2000. See articles 6 and 7.

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